"If You Want to Speak Spanish, Go Back to Mexico"?: A First Amendment Analysis of English-Only Rules in Public Schools

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I. INTRODUCTION

The Turner Unified School District (Turner) is located in Wyandotte County, Kansas, on the west end of Kansas City.[1] Turner's total enrollment for the 2010–2011 school year was 4094.[2] Of those students, 430 were black, 1382 were Hispanic, 36 were American Indian or Alaska native, 114 were Asian, and 133 were multi-ethnic.[3] Turner's mission is to ensure that "[e]very Turner student will be challenged academically and prepared socially to be a leader within a global society," and Turner is committed to "[u]nderstand[ing] [and] appreciat[ing] diversity."[4]

The Kansas River winds through the Turner school district and divides it into northern and southern territories.[5] The southern territory is home to the Endeavor Alternative School.[6] Endeavor aids the school district in its mission by "work[ing] with students in an alternative setting to recover high school credit and . . . assist[ing] students in reaching their academic goals."[7]

During the 2005–2006 school year, teachers and administrators at the Endeavor Alternative School repeatedly prohibited students of Hispanic origin from speaking Spanish on school premises.[8] On November 28, 2005, a

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[1] *Map to Board Office*, TURNER UNIFIED SCH. DISTRICT NO. 202, http://www.turnerusd202.org/page.cfm?p=1926 (last visited Apr. 1, 2012).

[2] *Kansas K–12 Reports*, KAN. STATE DEP'T OF EDUC., http://svapp15586.ksde.org/k12/CountyStatics.aspx?org_no=D0202 (last visited Apr. 1, 2012) (select "2010–2011" for "Enrollment by Grade, Race, & Gender" and click "Display Report").

[3] *Id.*

[4] *District Philosophy*, TURNER UNIFIED SCH. DISTRICT NO. 202, http://www.turnerusd202.org/page.cfm?p=2323 (last visited Apr. 1, 2012).

[5] *Proposed 2009/10 Elementary Attendance Areas*, TURNER UNIFIED SCH. DISTRICT NO. 202, http://www.turnerusd202.org/uploaded/AAA_School_Year_2009-2010/District_Information/Departments/Transportation/Turner_School_District.pdf (last visited Dec. 27, 2011)

[6] *Id.*

[7] *About Endeavor*, TURNER UNIFIED SCH. DISTRICT NO. 202, http://www.turnerusd202.org/page.cfm?p=3443 (last visited Apr. 1, 2012).

[8] Rubio v. Turner Unified Sch. Dist. No. 202, 453 F. Supp. 2d 1295, 1298 (D. Kan. 2006). Such rules, commonly known as English-only rules, have a long history in our nation's education system. *See* Office of Hawai'ian Affairs v. Dep't of Educ., 951 F. Supp. 1484, 1499 (D. Haw. 1996) ("According to Plaintiffs, beginning in 1896 Hawaii law banned students from speaking the Hawaiian language anywhere on school grounds. Purportedly children faced harsh physical punishment for speaking Hawaiian at schools . . . ."); DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS 164 (1990) ("One standard method of inculcating English-first in American schools has been to suppress the students' native tongue, punishing them for using the wrong language. The method may be as old as language instruction itself."); *id.* at 165 (describing the implementation of English-only rules in Native American schools since 1887); *id.* at 166 (explaining that until the late 1960s, many schools in the Southwest punished Hispanic students for speaking Spanish by imposing "fines, suspension, 'Spanish detention,' paddling, and even expulsion"); BILL PIATT, ¿ONLY ENGLISH?: LAW AND LANGUAGE POLICY IN THE

Mexican-American student at Endeavor was told not to speak Spanish during the lunch hour.[9] During the next school period, a teacher again told the student not to speak Spanish in the hallway and sent him to the principal's office.[10] The principal suspended the student for violating the prohibition on speaking Spanish and allegedly told him: "'If you want to speak Spanish, go back to Mexico.'"[11]

The student's father, Lorenzo E. Rubio, subsequently filed suit against Turner, the superintendent, the board of education, the individual members of the board, the principal, and several teachers.[12] He asserted claims under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.[13] The court dismissed all of the claims against all defendants except for Rubio's Title VI claim against Turner.[14]

This case is one manifestation of a much broader set of issues currently playing itself out on the national stage. The United States is a thoroughly multi-ethnic nation, and it is becoming more so every day. The Census Bureau reported that in 2002 Asian and Pacific Islanders, African-Americans, and Hispanics made up the following percentages of the nation's civilian non-institutionalized population: 4.4% Asian and Pacific Islander,[15] 13% African-American,[16] 13.3% Hispanic.[17] The Bureau also reported that 11.5% of the civilian non-institutionalized population was born in foreign countries, and 52.2% came from Latin America.[18] The Department of Homeland Security estimates that 12.5 million foreign-born, legal permanent residents lived in the United States as of January 1, 2009.[19] This "population includes persons

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UNITED STATES 42 (1990) ("[M]any children, particularly Hispanics, can recall days when they were punished, often physically, for speaking Spanish at school.").

[9] Amended Complaint (February 28, 2006) at 7–8, *Rubio*, 453 F. Supp. 2d 1295 (No. 05-2522-KHV).

[10] *Rubio*, 453 F. Supp. 2d at 1298.

[11] Amended Complaint, *supra* note 9, at 1–2.

[12] *Rubio*, 453 F. Supp. 2d at 1298.

[13] *Id.* at 1297, 1301.

[14] *Id.* For discussion of the legal analysis in *Rubio*, see *infra* Part II.

[15] TERRANCE REEVES & CLAUDETTE BENNETT, U.S. CENSUS BUREAU, THE ASIAN AND PACIFIC ISLANDER POPULATION IN THE UNITED STATES: MARCH 2002, at 1 (2003), *available at* http://www.census.gov/prod/2003pubs/p20-540.pdf.

[16] JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002, at 1–2 (2003), *available at* http://www.census.gov/prod/2003pubs/p20-541.pdf.

[17] ROBERTO R. RAMIREZ & G. PATRICIA DE LA CRUZ, U.S. CENSUS BUREAU, THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 2002, at 1–2 (2003), *available at* http://www.census.gov/prod/2003pubs/p20-545.pdf.

[18] DIANNE SCHMIDLEY, U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: MARCH 2002, at 1 fig.1 (2003), *available at* http://www.census.gov/prod/2003pubs/p20-539.pdf.

[19] NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2009, at 1 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_2009.pdf.

granted lawful permanent residence, [such as] 'green card' recipients, but not those who had become U.S. citizens."[20] The unauthorized immigrant population is estimated to have declined to 10.8 million in January 2009 from 11.6 million in January 2008.[21] Sixty-two percent of this population was from Mexico.[22]

Experts believe that the U.S. cultural and racial diversity will continue to increase for decades to come. The Census Bureau projects that total net international migration will increase to approximately 1.6 million in 2025 from about 1.3 million in 2010.[23] By 2050, that figure is expected to rise to approximately 2 million.[24]

While the United States has long celebrated its identity as a cultural melting pot, this mixing of cultures and steady stream of international migration has not been without conflict. At times, the conflict has taken the form of blatant violence and hostility toward immigrants. For example, in 2008, a man on Staten Island drove his truck into several storefronts owned by Mexican immigrants, causing significant damage.[25]

At other times, the conflict has manifested itself in the form of extreme laws[26] or law enforcement measures targeted at unauthorized immigrants. Sheriff Joe Arpaio of Maricopa County, Arizona, is at the vanguard of this form of conflict. Sheriff Arpaio's law enforcement tactics have included forcing inmates to wear exposed pink underwear and housing them in tents, and he and his deputies have gained notoriety for aggressive raids on immigrant communities.[27]

Ethnic conflict has manifested itself in a variety of legislative forms, including the so-called "English-only movement." In the early 1980s, California Senator S.I. Hayakawa helped found an advocacy group called "U.S. English," which lobbies "for Official English and against [multi]lingualism in public life."[28] The movement has been highly influential throughout the nation—by 2000, twenty-four states had adopted some form of Official English

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[20] *Id.*

[21] MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 1 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

[22] *Id.*

[23] U.S. CENSUS BUREAU, UNITED STATES POPULATION PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN: JULY 1, 2000–2050, at 4 (2008), *available at* http://www.census.gov/population/www/projections/methodstatement.pdf.

[24] *Id.*

[25] John Annese, *Staten Island Man Charged with Bashing Storefronts*, SILIVE.COM (Aug. 26, 2008, 3:00 PM), http://www.silive.com/news/index.ssf/2008/08/staten_island_man_charged_in_s.html.

[26] *See infra* notes 29–35 and accompanying text.

[27] Randal C. Archibold, *Challenges to a Sheriff Both Popular and Reviled*, N.Y. TIMES, Sept. 28, 2008, at A20, *available at* http://www.nytimes.com/2008/09/28/us/28sheriff.html.

[28] CARLOS J. OVANDO ET AL., BILINGUAL AND ESL CLASSROOMS: TEACHING IN MULTICULTURAL CONTEXTS 52 (4th ed. 2006).

legislation.[29] In the wake of the English-only movement's early lobbying activities, voters in California and Arizona passed propositions that mandate English-only instruction for students with limited English proficiency.[30]

Arizona's state legislature recently contributed to the conflict by passing the toughest illegal immigration law in the nation.[31] Under the law, state and local police are required to determine the legal status of people if there is "reasonable suspicion" that they are unauthorized immigrants.[32] Police are also required to arrest those "who are unable to pro[duce] documentation proving they are in the country legally."[33] Many are concerned that the law will result in discrimination against Latinos.[34] Opponents claim that "'[y]ou cannot tell if a person walking on a sidewalk is undocumented or not . . . [so] this is a mandate for racial profiling.'"[35]

It is crucial that we as a nation effectively minimize and manage this conflict, for, as the above statistics indicate, the United States is becoming more ethnically diverse every day.[36] Nowhere is conflict management more important than in the context of education. "Immigration's impact is often first seen in the

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[29] *Id.* For a discussion of the English-only movement and its impact on English as a Second Language instruction, see *id.* at 49–58. *See also* Ryan Moser, *Bilingual Abolitionists: Shadows of Facism—Propaganda of the Third Reich and the English-Only Movement*, *in* MAKING A DIFFERENCE IN THE LIVES OF BILINGUAL/BICULTURAL CHILDREN 13 (Lourdes Diaz Soto ed., 2002).

[30] Valeria v. Davis, 307 F.3d 1036, 1038 (9th Cir. 2002) ("Proposition 227 replaces bilingual education with a system of 'structured English immersion,' in which children are 'taught English by being taught in English.'"); Horne v. U.S. Dep't of Educ., No. CV-08-1141-PHX-MHM, 2009 WL 775432, at *3 (D. Ariz. Mar. 23, 2009) (same); *see also* OVANDO ET AL., *supra* note 28, at 56. Statutes such as these are to be distinguished from English-only rules applied to students. Statutes such as the ones enacted in California and Arizona require *teachers* to provide instruction in English—they do not require students to speak only English. For a discussion of the legal issues raised by these statutes, see generally Richard Delgado, *Rodrigo's Portent: California and the Coming Neocolonial Order*, 87 WASH. U. L. REV. 1293 (2010), and John Rhee, Note, *Theories of Citizenship and Their Role in the Bilingual Education Debate*, 33 COLUM. J.L. & SOC. PROBS. 33 (1999).

[31] ARIZ. REV. STAT. ANN. § 11-1051 (2012) ("For any lawful stop, detention or arrest made by a law enforcement official . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation."). The constitutionality of this statute was challenged in 2010, and the U.S. District Court for the District of Arizona granted a preliminary injunction to prevent its enforcement. United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 854 (2011) (mem.).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* (alteration in original) (quoting Pablo Alvarado, Director of the National Day Laborer Organizing Network).

[36] *See supra* notes 21–24 and accompanying text.

classroom."[37] Our nation's education system is rapidly becoming more diverse. In 1993, the diversity index (the percent chance that two students selected randomly would be members of different ethnic groups) in our education system was 52%.[38] By 2006, that figure had increased to 61%.[39] Approximately 21% of the student population in the education system is Hispanic, 17% is African American, 5% is Asian, and 1% is Native American.[40]

Many students in our public school system speak English as a second language, with a large number of them learning English as they go through school. During the 2004–2005 and 2005–2006 school years, 13.5% of students in the 100 largest school districts in the nation received instruction in English Language Learner [ELL] programs.[41] This amounted to over 1.5 million students.[42] In the Los Angeles Unified School District alone, 40.4% of students were served by ELL programs, amounting to 293,711 students.[43]

This large population of public school students speaking languages other than English creates special challenges for teachers and school administrators.[44] First, where teachers or administrators are unable to understand a language spoken by students,[45] their control over the students is potentially diminished. Any communication expressed in a language teachers cannot understand represents a sphere of student activity to which the teacher or administrator has limited access. With limited supervision comes the potential for student abuse.[46] Second, one of the primary functions of public schools is to develop students' language abilities. English is the predominant language spoken in the United

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[37] Robert Gebeloff et al., *Diversity in the Classroom*, N.Y. TIMES, http://projects.nytimes.com/immigration/enrollment (last visited Jan. 8, 2011) (reporting data from the National Center for Education Statistics).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] NAT'L CTR. FOR EDUC. STATISTICS, CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2005–06, at A-26 tbl.A-12 (June 2008), *available at* http://nces.ed.gov/pubs2008/2008339.pdf.

[42] *Id.*

[43] *Id.*

[44] For insight into *students'* experiences and struggles with multilingualism in public education, see generally TONGUE-TIED: THE LIVES OF MULTILINGUAL CHILDREN IN PUBLIC EDUCATION (Otto Santa Ana ed., 2004).

[45] This condition is increasingly common in our public schools. *See* JOANNE YATVIN, ENGLISH-ONLY TEACHERS IN MIXED-LANGUAGE CLASSROOMS: A SURVIVAL GUIDE 2 (2007) ("[P]lacing [non-English-speaking students] in classrooms where teachers are not prepared to teach them—or even communicate with them—is neither sound educational practice nor humane treatment. But that is what is happening.").

[46] *See, e.g.*, Lela Garlington, *Teacher Suspended; 2 Snowden Students Had Sex in His Class*, COM. APPEAL (Memphis), May 27, 1998, at A1 ("A Snowden School teacher has been suspended for leaving his classroom unattended for 15 minutes, during which time two students had sex.").

States, and therefore teachers and administrators have a duty to adequately develop students' English language skills.[47]

As *Rubio* demonstrates, some teachers and school administrators have responded to these challenges by imposing English-only rules on students.[48] It comes as no surprise that these rules have been controversial and have added to the conflict among ethnic groups in our nation. In addition to the controversy played out in the court of public opinion, these rules raise interesting issues under the U.S. Constitution[49] and Title VI of the Civil Rights Act of 1964. This Note focuses on one of these issues: the constitutionality of English-only rules in public schools under the First Amendment.

Part II reviews the literature on the constitutionality of English-only rules in public schools and explains how this Note contributes to the current literature. Part III addresses the threshold question of whether, for purposes of the First Amendment, the content of a statement includes the language in which the statement is communicated. Part IV discusses and analyzes the Supreme Court's line of student speech cases, from *Tinker* to *Morse*. Part V examines the extent to which the Constitution limits the power of public school authorities to prescribe and control the school curriculum. Part VI analyzes the constitutionality of English-only rules in public schools in light of the Court's student speech and curriculum cases. This Part fills many of the gaps in the current literature by identifying and offering solutions to various issues arising from the application of the First Amendment to English-only rules in public schools. Part VII concludes the Note with suggestions for future research.

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[47] 20 U.S.C. § 6812(1) (2006) (stating that one of the purposes of the English Language Acquisition, Language Enhancement, and Academic Achievement Act is to "ensure that children who are limited English proficient . . . attain English proficiency").

[48] Rubio v. Turner Unified Sch. Dist. No. 202, 453 F. Supp. 2d 1295, 1298 (D. Kan. 2006); *see also* Silva v. St. Anne Catholic Sch., 595 F. Supp. 2d 1171, 1174 (D. Kan. 2009) (challenging an English-only rule in a private school under Title VI of the Civil Rights Act of 1964); BARON, *supra* note 8, at 174 (describing a private school in Urbana, Illinois, that accepted no more than four non-English-speaking children per class and required them to speak only English during school); L. Darnell Weeden, *English Only Rules in Public Schools Should Be Presumed Illegal*, 34 T. MARSHALL L. REV. 379, 380–82 (2009) (discussing several examples of English-only rules in public schools, including a student in Texas who was made to write 500 times "I will not speak Spanish on school grounds" and a school in Illinois that made students sign a contract under which comments in Spanish were presumed to involve bullying); Press Release, ACLU, ACLU Asks Esmeralda County to Stop English-Only Rule on School Bus (Jan. 31, 2008), *available at* http://www.aclu.org/immigrants-rights/aclu-asks-esmeralda-county-stop-english-only-rule-school-bus (The ACLU sent letter to superintendent of Esmeralda County School District in Nevada stating that a rule prohibiting students from speaking Spanish on school buses violated the Constitution.).

[49] Both the First Amendment and the Equal Protection Clause are implicated by English-only rules. *See* Sisneros v. Nix, 884 F. Supp. 1313, 1319 (S.D. Iowa 1995) (challenging a prison's English-only policy on the basis of the First Amendment and the Fourteenth Amendment).

II. LITERATURE ON THE CONSTITUTIONALITY OF ENGLISH-ONLY RULES IN PUBLIC SCHOOLS

English-only rules have been applied in a variety of settings, including employment,[50] state Official-English statutes and constitutional amendments,[51] prisons,[52] and education.[53] These rules have received a great deal of attention from legal commentators,[54] and they have inspired a significant amount of litigation.[55]

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[50] *See, e.g.*, Montes v. Vail Clinic, Inc., 497 F.3d 1160, 1169–72 (10th Cir. 2007); Maldonado v. City of Altus, 433 F.3d 1294, 1298–1301 (10th Cir. 2006); Garcia v. Gloor, 618 F.2d 264, 266–67 (5th Cir. 1980); Barber v. Lovelace Sandia Health Sys., 409 F. Supp. 2d 1313 (D.N.M. 2005); EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1068–69 (N.D. Tex. 2000).

[51] These statutes and amendments typically require that English be the only language spoken by elected officials and other government employees. *See, e.g.*, CAL. CONST. art. III, § 6(a), (c) ("English is the common language of the people of the United States of America and the State of California. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by this Constitution. . . . The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced."); Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (en banc) (holding Arizona's Official-English state constitutional amendment unconstitutional), *vacated as moot sub nom.* Arizonans for Official English v. Arizona, 520 U.S. 43 (1997); *In re* Initiative Petition No. 366, 46 P.3d 123, 127 (Okla. 2002) (proposed Official-English statute would have "prohibit[ed] all governmental communications, both written and oral, by government employees, elected officials, and citizens, of all words, even those which are of common usage, in any language other than English when conducting state business"). Similar legislation has been proposed in the U.S. Congress, with no success to date. *See, e.g.*, Carl Hulse, *Senate Passes a Bill that Favors English*, N.Y. TIMES, May 19, 2006, at A18.

[52] *See, e.g.*, Ortiz v. Fort Dodge Corr. Facility, 368 F.3d 1024, 1025–26 (8th Cir. 2004) (holding that prohibition on a prisoner writing letters to family members in Spanish did not violate the First Amendment); Thongvanh v. Thalacker, 17 F.3d 256, 259 (8th Cir. 1994) (holding that a prison's English-only policy violated an inmate's constitutional rights).

[53] *See supra* note 8.

[54] *See generally* Philip C. Aka & Lucinda M. Deason, *Culturally Competent Public Services and English-Only Laws*, 53 HOW. L.J. 53 (2009); Philip C. Aka et al., *Measuring the Impact of Political Ideology on the Adoption of English-Only Laws in the United States*, 13 SCHOLAR 1 (2010); Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989); Cathryn L. Claussen, *The LPGA's English Proficiency Rule: An-e-yo, Kamsa-Hamnida*, 20 J. LEGAL ASPECTS SPORT 135 (2010); Kiyoko Kamio Knapp, *Language Minorities: Forgotten Victims of Discrimination?*, 11 GEO. IMMIGR. L.J. 747 (1997); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992); Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CALIF. L. REV. 1347 (1997); Michael A. Zuckerman, *Constitutional Clash: When English-Only Meets Voting Rights*, 28 YALE L. & POL'Y REV. 353 (2010); Michele Arington, Note,

However, there has been very little said in the academic community about English-only rules in public schools. Furthermore, only one case[56] has challenged the constitutionality of English-only rules as applied to public school students.

A. Rubio v. Turner Unified School District

As discussed above, the plaintiff in *Rubio* claimed that the teacher, the principal, and the school district violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 by implementing an English-only rule.[57] Rubio's equal protection claim against the school district failed because the principal and teacher who imposed the at-issue punishment did not have final policymaking authority.[58] Under 42 U.S.C. § 1983, a school district may be liable for a constitutional violation "only if an official custom or policy caused a violation of plaintiff's constitutional rights or an individual with final policymaking authority made the decision which violated his constitutional rights."[59] While the principal and the teacher may have had *decision-making authority*, this is not equivalent to *policymaking authority*, and therefore the district could not be held liable for their constitutional violations.[60]

The equal protection claim against the principal and the teacher acting in their personal capacities also failed, but for a different reason. The court concluded that Rubio sufficiently alleged that the teacher and principal had violated the student's right to equal protection because "the risk of discipline for violating [English-only] rules falls disproportionately on those students who

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English-Only Laws and Direct Legislation: The Battle in the States over Language Minority Rights, 7 J.L. & POL. 325 (1991); Margaret Robertson, Comment, *Abridging the Freedom of Non-English Speech: English-Only Legislation and the Free Speech Rights of Government Employees*, 2001 BYU L. REV. 1641; Carol Schmid, Comment, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. CENT. L.J. 65 (1992); Evan L. Seite, Note, *Language Legislation in Iowa: Lessons Learned from the Enactment and Application of the Iowa English Language Reaffirmation Act*, 95 IOWA L. REV. 1369 (2010); Jonathan Stensvaag, Note, *English-Only Rules: Title VII, Title II, and the Ladies Professional Golf Association's Proposed English-Only Rule*, 13 J. GENDER RACE & JUST. 241 (2009).

[55] For a survey of cases addressing English-only laws, see Josh Hill et al., *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 U. KAN. L. REV. 669 (2009). The authors note that "[m]uch has been written and discussed regarding English-only policies at the workplace. Whether a public school can require English to be spoken during school hours presents an intriguing legal question." *Id.* at 704 (footnote omitted).

[56] Rubio v. Turner Unified Sch. Dist. No. 202, 453 F. Supp. 2d 1295, 1298 (D. Kan. 2006).

[57] *See supra* notes 12–13 and accompanying text.

[58] *Rubio*, 453 F. Supp. 2d at 1303.

[59] *Id.* at 1301 (citations omitted).

[60] *Id.* at 1302.

speak Spanish and limited English."[61] In arriving at this conclusion, the court rejected Defendants' argument that there was no Equal Protection Clause violation "because courts have consistently upheld English-only policies outside the educational setting."[62] The court pointed to EEOC guidelines, according to which "English-only workplace rules which have no exceptions (such as at lunch or on breaks) are a 'burdensome term and condition of employment' which constitute a Title VII violation."[63] The court also stated that "English-only workplace policies may 'create an atmosphere of inferiority, isolation, and intimidation' that creates a discriminatory environment."[64]

While the principal and teacher may have violated Rubio's equal protection rights, the court held that they were immune from liability for this potential violation because they had qualified immunity as government officials.[65] According to the doctrine of qualified immunity, government officials are safeguarded from liability during their performance of discretionary functions "unless their actions violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[66] In order for a right to be clearly established, "'there must be a Supreme Court or other Tenth Circuit decision on point, or the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains.'"[67] The court's conclusion on this issue rested on the following observation:

> Plaintiff has not cited any case (Supreme Court, Tenth Circuit or otherwise) which establishes a right to speak a foreign language at a public school. The Court is not aware of any such case. In addition, many courts have suggested that at least in the employment context, English-only rules are permissible.[68]

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[61] *Id.* at 1304.

[62] *Id.*

[63] *Id.*

[64] *Rubio*, 453 F. Supp. 2d at 1304 (quoting Maldonado v. City of Altus, 433 F.3d 1294, 1305 (10th Cir. 2006) (*Maldonado* itself was quoting 29 C.F.R. § 1606.7.)).

[65] *Id.* at 1306. The court's application of qualified immunity to completely dismiss the principal and teacher in this case appears to have been mistaken, for qualified immunity does not apply to claims for declaratory or injunctive relief. *See, e.g.*, Hewitt v. Helms, 482 U.S. 755, 766 (1987) (Marshall, J., dissenting) (stating that qualified immunity "precluded any remedy in damages against [prison officials], but by no means prevented the ordering of declaratory or injunctive relief"); Pulliam v. Allen, 466 U.S. 522, 541–42 (1984) (holding that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity"). The plaintiff in *Rubio* sought several forms of relief, including various declarations and injunctions against the defendant principal and teacher. Amended Complaint, *supra* note 9, at 22–24.

[66] *Rubio*, 453 F. Supp. 2d at 1304–05 (quoting Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1255 (10th Cir. 1998)).

[67] *Id.* at 1305 (quoting Moore v. Guthrie, 438 F.3d 1036, 1042 (10th Cir. 2006)).

[68] *Id.* (citing *Maldonado*, 433 F.3d at 1315–16).

The court also used qualified immunity as the basis for denying Rubio leave to amend his complaint to state a claim for violation of the student's free speech rights.[69]

B. *Academic Literature on English-Only Rules in Public Schools*

Only one law review article[70] has addressed the constitutionality of English-only rules in public schools. In it, L. Darnell Weeden discusses the constitutionality of English-only rules under the First and Fourteenth Amendments and the legality of such rules under Title VI of the Civil Rights Act of 1964.

With respect to the First Amendment, Weeden claims that the Supreme Court's seminal student speech case—*Tinker v. Des Moines Independent Community School District*—prohibits school authorities from imposing English-only rules on students based on a generalized fear that the use of languages other than English will cause disruption.[71] He suggests that "school officials are using conjecture and national origin stereotyping of Hispanic students to create the unsupported presumption that Spanish-speaking students will create chaos in the school environment through the simple act of speaking Spanish."[72]

Weeden expresses great concern that English-only rules in public schools will contribute to the anti-immigration movement spreading across the nation:

> In suppressing Spanish at schools, school officials are targeting children of Hispanic origin at a time when it is unpopular to be of Hispanic origin. This current anti-immigrant backlash can be explained in part by the changing

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[69] *Id.* at 1307. Rubio's Title VI claim against Turner was the only one to survive Defendant's motion to dismiss. *Id.* at 1297.

[70] *See* Weeden, *supra* note 48.

[71] *Id.* at 382–83. For an examination of *Tinker*, see *infra* Part IV.A. The Court in *Tinker* held that school officials may restrict student speech only where the restriction is based on a reasonable forecast of material and substantial disruption to school activities. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (Stewart, J., concurring).

[72] Weeden, *supra* note 48, at 382. For more on the anti-immigration sentiment across the nation, see Lewis Diuguid, *Sound Familiar? Legislators Turn on Those They Represent*, TULSA WORLD, Mar. 12, 2011, at A21, Steve Friess, *Stars and Strife: Flag Rule Splits Town: Prostitution Is Legal, but Displays of Heritage Raise Hackles*, N.Y. TIMES, Dec. 18, 2006, at A26, Mirta Ojito, *Bias Suits Increase over English-Only Rules*, N.Y. TIMES, Apr. 23, 1997, at B1, Katharine Q. Seelye et al., *Immigration Law Debate Resonates Far from Border*, N.Y. TIMES, May 1, 2010, at A8, Heather Draper, *ICE Turns up Heat on I-9s*, DENVER BUS. J., Mar. 11, 2011, http://www.bizjournals.com/denver/print-edition/2011/03/11/ice-turns-up-heat-on-i-9s.html, and M.J. Ellington, *Opponents of Hammon Bill Rally at State House*, DECATUR DAILY (Ala.), Mar. 11, 2011, http://www.decaturdaily.com/stories/Opponents-of-Hammon-bill-rally-at-State-House,76465.

> demography of the United States as well as the growth of the Hispanic population since 1990.[73]

Weeden also expresses concern that prohibiting the use of Spanish or other non-English languages will deny students "a diverse experience at school as well as an opportunity to develop personal intercommunication skills."[74]

C. *How This Note Contributes to the Current Literature*

This Note adds to the current literature in five ways. First, it addresses the threshold issue of the level of First Amendment protection applied to choice of language.[75] In the process, it offers an argument for treating the language in which a statement is communicated as an element of the statement's content for purposes of the First Amendment.[76] Second, it acknowledges the declining vitality of the Supreme Court's decision in *Tinker* and discusses how this decline might affect the First Amendment analysis of English-only rules.[77] Third, this Note analyzes the constitutionality of English-only rules according to the mode of analysis developed by the Court in *Hazelwood School District v. Kuhlmeier*.[78] Fourth, it accounts for the diverse circumstances under which an English-only rule might be implemented and recommends solutions for several issues that may arise from those circumstances.[79] Fifth, and finally, it addresses the issue of whether an English-only rule in public schools could be justified by a desire to promote English as a common language.[80]

III. STUDENTS' CHOICE OF LANGUAGE RECEIVES FULL PROTECTION UNDER THE FIRST AMENDMENT

The First Amendment, in pertinent part, states: "Congress shall make no law . . . abridging the freedom of speech . . . ."[81] While the First Amendment, by its terms, applies only to Congress, it has been applied to the states by incorporation into the Due Process Clause of the Fourteenth Amendment.[82] Furthermore, it is well settled that students in public schools enjoy the protection of the First Amendment while on school premises.[83]

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[73] Weeden, *supra* note 48, at 383.

[74] *Id.* at 384.

[75] *See infra* Part III.

[76] *See infra* Part III.C.

[77] *See infra* Part IV.A–B.

[78] *See infra* Parts IV.B.2 and VI.B.

[79] *See infra* Part VI.

[80] *See infra* Part VI.C.

[81] U.S. CONST. amend. I.

[82] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n.1 (1996).

[83] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

While it is established that student speech is protected by the First Amendment,[84] some question the level of protection that extends to choice of language. For instance, the defendant in *Rubio* responded to plaintiff's motion for leave to amend with the following argument:

> Plaintiff complains not that he was prohibited from speaking or from conveying his message, but that he was prohibited from doing so in a particular language—Spanish. In essence, Plaintiff is complaining about a content-neutral mode or method of communication[,] something which is not necessarily protected by the First Amendment. Thus, Plaintiff fails to show that he even engaged in a protected activity under the First Amendment.[85]

This argument is based on the distinction drawn by the Supreme Court between content-based and content-neutral restrictions on speech.

A. *The Distinction Between Content-Based and Content-Neutral Restrictions*

The Court's First Amendment jurisprudence involves a two-tiered system of judicial review.[86] Where a restriction on speech is content-based, it is subject to heightened scrutiny.[87] A restriction is content-based where it prohibits speech because of the subject matter or viewpoint expressed in the speech.[88] For instance, the Court in *United States v. Playboy Entertainment Group, Inc.* held that a law that exclusively regulated sexual speech was a content-based restriction.[89]

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[84] However, Justice Clarence Thomas concurred in the Court's most recent student speech case, *Morse v. Frederick*, 551 U.S. 393 (2007), and stated that "[i]n light of the history of American public education, it cannot seriously be suggested that the First Amendment 'freedom of speech' encompasses a student's right to speak in public schools." *Id.* at 419.

[85] Defendant's Response in Opposition to Plaintiff's Motion for Leave to File a Third Amended Complaint at 8, Rubio v. Turner Unified Sch. Dist., 453 F. Supp. 2d 1295 (D. Kan. 2006) (No. 05-2522-KHV) (citations omitted); *see also* Yniguez v. Arizonans for Official English, 69 F.3d 920, 934 (9th Cir. 1995) ("Arizonans for Official English argues vehemently that First Amendment scrutiny should be relaxed in this case because the decision to speak a non-English language does not implicate pure speech rights."); Natalie Prescott, *English Only at Work, Por Favor*, 9 U. PA. J. LAB. & EMP. L. 445, 463 (2007) (arguing that "[t]he right to language is not equivalent to the right to speech for First Amendment purposes," thus "merely restricting one's ability to speak a foreign language does not invoke constitutional protection").

[86] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 933 (3d ed. 2006).

[87] Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).

[88] Hill v. Colorado, 530 U.S. 703, 722–23 (2000); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980).

[89] 529 U.S. 803, 803 (2000).

On the other hand, content-neutral restrictions are subject to a reduced level of scrutiny.[90] A restriction is content-neutral "if it applies to all speech regardless of the message."[91] For example, the Court in *Turner Broadcasting v. FCC* held that a law requiring companies to carry local broadcasting stations was content-neutral because the companies had to carry all stations, no matter the content of their programming.[92]

B. Tinker *and Content-Neutral Restrictions*

The Court in *Tinker* held that school officials may restrict student speech only if they reasonably forecast that the speech will cause a material and substantial disruption or interfere with the rights of others.[93] As interpreted by lower courts, this standard is stricter than the reduced level of scrutiny typically applied to content-neutral restrictions.[94] The circuits are split over whether the heightened *Tinker* standard applies to content-neutral restrictions on student speech.[95] Some circuits have held that *Tinker* applies only to content-based restrictions.[96] Others have held that *Tinker* applies to all student speech restrictions that are not covered by the Court's decisions that followed in the wake of *Tinker*.[97] According to this broad view, *Tinker* applies to restrictions on student speech, whether or not they are content-based.

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[90] *Turner*, 512 U.S. at 642.

[91] CHEMERINSKY, *supra* note 86, at 936.

[92] *Turner*, 512 U.S. at 622.

[93] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509, 511, 515 (1969). See *infra* Part IV.A for a discussion of *Tinker*.

[94] *See, e.g.*, M.A.L. *ex rel.* M.L. v. Kinsland, 543 F.3d 841, 850 (6th Cir. 2008) (referring to "*Tinker*'s heightened standard"); Smith v. Tarrant Cnty. Coll. Dist., 694 F. Supp. 2d 610, 628 (N.D. Tex. 2010) (same).

[95] Geoffrey A. Starks, Tinker*'s Tenure in the School Setting: The Case for Applying* O'Brien *to Content-Neutral Regulations*, 120 YALE L.J. ONLINE 65, 65–66 (2010), http://yalelawjournal.org/images/pdfs/901.pdf ("There remains a long-standing fault line under the *Tinker* doctrine that the Court has acknowledged but has yet to repair: is *Tinker*'s standard limited to only content- and viewpoint-based regulations . . . ?"); R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 712–13 (2009) ("Whether *Tinker* should be read to apply to not only viewpoint- or content-based regulations, but also to content-neutral regulations of speech is unclear. . . . [T]he circuit courts are currently divided.").

[96] *See, e.g.*, Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 431 (9th Cir. 2008) (stating that "no reading of *Tinker* suggests that viewpoint- and content-neutral restrictions on student speech should also be subjected to '*Tinker* scrutiny'"); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 442–43 (5th Cir. 2001) (stating that "*Tinker* addressed disciplinary action by school officials directed at the political content of student expression"); Starks, *supra* note 95, at 71–74 (arguing that *Tinker* should be limited to content-based restrictions).

[97] *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001); Henerey v. City of St. Charles, 200 F.3d 1128, 1132 (8th Cir. 1999); C.H. v. Bridgeton Bd. of Educ., No. 09-5815(RBK/JS), 2010 WL 1644612 at *6 (D.N.J. Apr. 22, 2010) (stating that "[t]he Third Circuit has been clear: if student speech is not lewd, school-sponsored, or advocating

This split among the circuits will have significant implications for a variety of student speech cases.[98] However, the split should not affect the analysis of English-only rules, because the content of a statement includes the language in which it is communicated.

C. *Language Is Content*

Whether or not the content of a statement includes the language in which it is communicated is a perplexing question. As the Supreme Court of Alaska recently noted, a restriction on choice of language "does not present the classic example of a content-based restriction, such as a prohibition on political protest based upon the viewpoint represented. . . . But clearly such a restriction affects more than the form of speech. Communication begins with language . . . ."[99]

Proponents of English-only rules argue that restrictions on choice of language are content-neutral—at least as applied to multilingual speakers—because they restrict only the mode in which a message is conveyed, not the message itself.[100] Those who oppose English-only rules argue that choice of language itself conveys a message, and thus language is equivalent to content.[101] For instance, the plaintiff in a case challenging an English-only rule imposed on city employees argued that speaking Spanish conveyed pride in one's heritage and ethnicity.[102] He likened the use of Spanish to wearing a tee-shirt proclaiming "'PROUD TO BE HISPANIC!'"[103]

The Supreme Court has never directly addressed the question of whether language is content, but it did address a related issue in *Cohen v. California*. In *Cohen*, the plaintiff was arrested for disturbing the peace when he wore a jacket

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drug use, the standard is *Tinker*"). See *infra* Part IV.B for a discussion of the cases that followed in the wake of *Tinker*.

[98] For instance, courts have held that dress-code policies are content-neutral. *See, e.g.*, Bar-Navon v. Sch. Bd., No. 6:06-CV-1434-Orl-19KRS, 2007 WL 3284322 (M.D. Fla. Nov. 5, 2007). Thus, in jurisdictions that adopt the narrow approach to *Tinker*, school dress codes will be less susceptible to constitutional challenge.

[99] Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 206 (Alaska 2007).

[100] *See supra* note 85 and accompanying text.

[101] *See* Joshua A. Fishman, *The Sociology of Language: An Interdisciplinary Social Science Approach to Language in Society*, *in* 1 ADVANCES IN THE SOCIOLOGY OF LANGUAGE 219 (Joshua A. Fishman ed., 1971) (Language "is not merely a *carrier* of content, whether latent, or manifest. Language itself *is* content, a referent for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as the societal goals . . . that typify every speech community.").

[102] Appellant's Opening Brief at 57, Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006) (No. Civ-03-336-R); *see also* OVANDO ET AL., *supra* note 28, at 136; Cameron, *supra* note 54, at 1364–65 ("[S]ociologists and sociolinguists tell us that Spanish, like any primary language, is a fundamental aspect of ethnicity. If ethnicity is 'both the sense and the expression of collective, intergenerational cultural continuity', then for Latino people the Spanish language is the vehicle by which this sense and expression are conveyed.").

[103] Appellant's Opening Brief, *supra* note 102, at 57.

bearing the words "Fuck the Draft" into a courthouse.[104] He claimed he wore the jacket as a way of informing the public about his feelings against the Vietnam War and the draft.[105] The Court held that the plaintiff's speech was protected by the First Amendment.[106]

The Court's opinion contained three elements relevant to our analysis. First, at the outset of its analysis, the Court listed several issues that the record in this case did *not* present.[107] In this portion of the opinion, the Court stated that "the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed .... Cohen could not ... be punished for asserting the evident position on the inutility ... of the draft ...."[108] This statement implies that an individual's choice of particular words is distinct from his or her message, yet still protected by the First Amendment.[109] Thus, characterizing choice of language as a mode of communication may not determine the level of First Amendment protection it receives.[110]

Second, the Court stated that "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."[111] This notion that linguistic expression communicates on both an emotional and a cognitive level is consistent with the widely accepted notion that a person's

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[104] Cohen v. California, 403 U.S. 15, 16 (1971).

[105] *Id.*

[106] *Id.* at 26.

[107] *Id.* at 18.

[108] *Id.*

[109] Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1349–50 (2002) ("[T]he Court's discussion suggested that word choice, and possibly other aspects of manner of speech, can have as much communicative significance as viewpoint or subject matter, and thus should be similarly protected, regardless of the nomenclature used to categorize such communicative choices.").

[110] For a discussion of a theory of the First Amendment based on the significance of the manner in which a statement is communicated, see *id.* "The argument is that the same assumptions of human capacity for intelligent decision making that are said to demand government respect for choice of message and subject matter, similarly demand government respect for the substantive manner in which any person or group deems it best to convey their message." *Id.* at 1376–77.

[111] *Cohen*, 403 U.S. at 26. This notion of language serving a dual communicative function shares much with the Ninth Circuit's analysis in *Yniguez v. Arizonans for Official English*. The court in *Yniguez* noted the "variety of ways that one's use of language conveys meaning. For example, even within a given language, the choice of specific words or tone of voice may critically affect the message conveyed. Such variables—language, words, wording, tone of voice—are not expressive conduct, but are simply among the communicative elements of speech." 69 F.3d 920, 935 (9th Cir. 1995) (en banc), *vacated as moot sub nom.* Arizonans for Official English v. Arizona, 520 U.S. 43 (1997). The court then proceeded to analogize choice of language to the choice of words present in *Cohen*. *Id.*

language expresses a part of her identity and pride in her heritage.[112] For instance, language instruction scholars have acknowledged that a person's first language "is used at home or in the language minority community because [it] is intimately connected to his or her self-identity. . . . [One's first language] is associated with the most important and intimate aspects of existence."[113] Thus, "to take [away a person's first language] is to rob a person of his or her most basic identity and meaning in life."[114]

Finally, the Court acknowledged that it would be very difficult to place effective limitations on a rule that allowed the restriction of certain words but not others.[115] Such a rule seemed "inherently boundless" to the Court, for "[h]ow is one to distinguish this from any other offensive word?" Restrictions on choice of language are plagued by a similar problem. While we tend to assume that there are clearly defined boundaries between languages, the reality is that languages bleed into one another. For example, the words "burrito," "pronto," "rodeo," "aficionado," "bonanza," and "armadillo" all come from the Spanish language, yet they are commonly used by English speakers.[116] This raises the question: which Spanish words would an English-only rule actually prohibit? All words of Spanish derivation, or only those not commonly used by English speakers? Assuming an English-only rule was not meant to prohibit the use of such commonly used words as "taco" or "bronco,"[117] how would its proponents distinguish between acceptable and unacceptable Spanish words?

Thus, *Cohen* suggests that language is an element of the content of speech. The literature on language and language instruction is in accord with this conclusion.[118] Accordingly, the Court's holding in *Tinker* should apply to students' choice of language, regardless of whether *Tinker* is limited to content-based restrictions.

IV. STUDENT SPEECH AND THE FIRST AMENDMENT

The Supreme Court often refers to the "marketplace of ideas" in its First Amendment cases.[119] According to the metaphor, our national discourse is like

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[112] *See supra* text accompanying notes 102–03.

[113] OVANDO ET AL., *supra* note 28, at 136.

[114] *Id.*; *see also* Cameron, *supra* note 54, at 1364–65 ("The Spanish language is central to Latino identity. . . . Spanish, like any primary language, is a fundamental aspect of ethnicity. If ethnicity is 'both the sense and the expression of collective, intergenerational cultural continuity,' then for Latino people the Spanish language is the vehicle by which this sense and expression are conveyed.").

[115] *Cohen*, 403 U.S. at 25.

[116] Gerald Erichsen, *Spanish Words Become Our Own: Adopted and Borrowed Words Enrich English*, ABOUT.COM, http://spanish.about.com/cs/historyofspanish/a/Spanish loanword.htm (last visited Feb. 19, 2012).

[117] *Id.*

[118] *See supra* notes 102, 103, 114 and accompanying text.

[119] *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 906 (2010); N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008); Abrams v. United States, 250 U.S.

a market in which ideas are competing for support. The First Amendment serves to minimize artificial restraints on the market so that the fate of an idea depends on the public's estimation of its merit.

Public schools occupy a unique position in this marketplace. In some respects, schools are at the very center of the market, bustling with intellectual activity and academic discourse. As the Supreme Court has stated: "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of the multitude of tongues, [rather] than through any kind of authoritative selection."[120] From this perspective, the purpose of schools is to prepare our nation's youth to engage in the intellectual bargaining that goes on in the marketplace by exposing them to the free exchange of ideas and guiding them along the way. Hereinafter, this conception of public schools will be referred to as the marketplace vision of public education. The marketplace vision suggests that there is perhaps no place where the protection of the First Amendment is more necessary than in public schools.

In other respects, however, public schools exist largely outside of the marketplace of ideas. On a very practical level, common sense tells us that a truly and thoroughly free exchange of ideas in our public schools would be both unworkable and undesirable. Order and discipline require limits on students' ability to freely express themselves. Student interruptions can impede a teacher's ability to impart his or her knowledge, and off-topic discussions can result in wasted class time.[121] On a more philosophical level, the purpose of public schools is not only to prepare students to navigate the marketplace of ideas, but also to shape and build students' character. The Supreme Court embraced this vision of public schools when it stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness . . . ."[122]

616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

[120] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); *see also* Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

[121] *See* Sam Goldstein & Richard Rider, *Disruptive Behaviors*, *in* UNDERSTANDING AND MANAGING CHILDREN'S CLASSROOM BEHAVIOR: CREATING SUSTAINABLE, RESILIENT CLASSROOMS 91, 91 (Sam Goldstein & Robert B. Brooks eds., 2d ed. 2007) ("Regardless of the labels applied to disruptive children and their problems, these youngsters present the most difficult challenges faced by classroom teachers. Impulsivity, hyperactivity, verbal and physical aggression, . . . and noncompliance create problems between student and teacher that often radiate and impact other students as well.").

[122] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)); *see also* Brown v. Bd.

Hereinafter, this understanding of public schools will be referred to as the character building vision of public education. This vision suggests that the First Amendment is of diminished importance in public schools, because free expression on the part of students may hamper the ability of school officials to engrain certain habits and values in the minds of students.

The Court first applied the First Amendment to student speech in the late 1960s, and since then, both of these visions of public education have informed the Court's student speech decisions to varying degrees.[123] To a large extent, the amount of First Amendment protection afforded student speech has depended on the vision of public education emphasized by the Court. The trend over the last three decades has been away from the marketplace vision and toward the character building vision.[124]

A. Tinker v. Des Moines Independent Community School District

The Court's seminal student speech case was *Tinker v. Des Moines Independent Community School District*. Several high school and middle school students wore black armbands to school in protest of the Vietnam War.[125] The students refused to remove the armbands and they were consequently suspended from school.[126] The Supreme Court held that the school violated the First Amendment by suspending the students for their symbolic speech.[127]

The Court began its analysis with these now-famous words: "First Amendment rights, applied in light of the special characteristics of the school

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of Educ., 347 U.S. 483, 493 (1954) (describing public education as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment"); Nuxoll v. Indian Prairie Sch. Dist. 204, 523 F.3d 668, 674–75 (7th Cir. 2008) (Judge Posner stated that "high-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults . . . .").

[123] For a discussion of the tension between these two visions of public education, see *Board of Education v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring). Justice Blackmun specifically acknowledged this tension when he stated: "[W]e must reconcile the schools' 'inculcative' function with the First Amendment's bar on 'prescriptions of orthodoxy.'" *Id.* at 879. For a discussion of the tension between the autonomy of school authorities and the Establishment Clause of the First Amendment, see *Epperson v. Arkansas*, 393 U.S. 97 (1968).

[124] Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1186 (2009) ("Since *Tinker*, courts have increasingly perceived public schools as responsible for instilling community values in their students, perhaps at the cost of suppressing individual rights."); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 529 (2000) (stating that the Supreme Court's decisions in the wake of *Tinker* "see schools as authoritarian institutions, much like prisons or the military, and they openly express judicial deference to the choices of school officials").

[125] *Tinker*, 393 U.S. at 504.

[126] *Id.*

[127] *Id.* at 514.

environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[128] The Court also signaled its approval of the marketplace vision of public education:

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.[129]

The Court went on to explain that students may "express [their] opinions, even on controversial subjects . . . , if [they do] so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."[130] Furthermore, school officials may not rely on "undifferentiated fear or apprehension of disturbance" to justify a restriction on student speech, for "[a]ny departure from absolute regimentation may cause trouble."[131]

Applying these principles to the facts of the case, the Court held that the school violated the First Amendment by punishing the students for wearing armbands.[132] The Court's decision rested on the fact that "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."[133]

Justice Black, in his dissenting opinion, advocated strongly for the character building vision of public education and foreshadowed the Supreme Court opinions that followed in the wake of *Tinker*.[134] According to Justice Black, public school students are not sent to school at public expense to broadcast their views.[135] Instead, "[t]he original idea of schools . . . was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. . . . [T]axpayers send children to school on the premise that at their age they need to learn, not teach."[136]

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[128] *Id.* at 506.

[129] *Id.* at 512.

[130] *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[131] *Tinker*, 393 U.S. at 508.

[132] *Id.* at 514.

[133] *Id.*

[134] *See* Chemerinsky, *supra* note 124, at 535 ("[T]he Supreme Court rulings subsequent to *Tinker* have almost all sided with school officials and appear to have followed an approach much closer to Justice Black's than the majority.").

[135] *Id.* at 534.

[136] *Tinker*, 393 U.S. at 522.

B. Tinker's *Progeny*

Tinker was a strident defense of the free speech rights of public school students. The Court stated in no uncertain terms that students do indeed retain their First Amendment rights at school, and the Court appeared to adopt the marketplace vision of public education. However, the student speech cases that have followed in the wake of *Tinker* indicate that students' free speech rights are not nearly as broad as *Tinker* suggested. The Court has embraced the character building vision of public education and has grown more deferential to public school authorities.[137] In fact, all of the Supreme Court's student speech cases since *Tinker* have been decided in favor of the public schools.[138]

1. Bethel School District No. 403 v. Fraser

The first student speech case decided after *Tinker* was *Bethel School District No. 403 v. Fraser*.[139] Fraser, a high school student, delivered a speech at a school assembly. The speech involved an "elaborate, graphic, and explicit sexual metaphor," and Fraser was warned in advance not to deliver it.[140] He was suspended for delivering the speech, and the Court held that the suspension was constitutional.[141]

Early in its analysis, the Court signaled its support for the character building vision of public education by quoting two historians for the proposition that "'[p]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensible to the practice of self-government. . . .'"[142] The Court went on to explain that "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[143]

In conducting this balancing, the Court considered the fact that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[144] The Court ultimately

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[137] *See* Chemerinsky, *supra* note 124, at 529.

[138] *See* Morse v. Frederick, 551 U.S. 393, 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986); *see also* Chemerinsky, *supra* note 124, at 528 ("[I]n the thirty years since *Tinker*, schools have won virtually every constitutional claim involving students' rights.").

[139] 478 U.S. 675.

[140] *Id.* at 678.

[141] *Id.* at 685.

[142] *Id.* at 681 (quoting BEARD & BEARD, *supra* note 122, at 228).

[143] *Id.*

[144] *Id.* at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340–42 (1985)).

concluded that the school district was within its permissible authority in punishing Fraser.[145]

Fraser sent a clear message that the free speech rights of public school students are subject to limitations beyond the mere requirement that student speech not substantially and materially disrupt school functions or invade the rights of others. However, the extent of these limitations was left unclear. The Court considered a number of rights and interests in arriving at its holding in *Fraser*, but it was unclear what other interests of public school authorities might factor into the analysis.

2. Hazelwood School District v. Kuhlmeier

Just two years after *Fraser* was decided, the Court decided its next student speech case, *Hazelwood School District v. Kuhlmeier*.[146] A group of students submitted two stories for publication in a school newspaper; one story was about students' experiences with pregnancy and the other was about the impact of divorce on students' lives.[147] The school principal reviewed the stories and raised concerns about protecting the privacy of students and parents, and shielding younger students from references to sexuality.[148] Believing there was not enough time before the publication date to address these issues, the principal ordered that the articles be withheld from the newspaper.[149]

In the first phase of its analysis, the Court concluded that the school newspaper was not a public forum,[150] but was instead a part of the school's curriculum. Activities such as school newspapers, which could reasonably be perceived to bear the school's imprimatur, can be characterized as part of the school curriculum, even if they occur outside of the classroom, "so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[151] Because the newspaper was part of the curriculum, "school officials were entitled to regulate the contents of [the paper] in any reasonable manner," and the *Tinker* standard did not apply to the case.[152] The Court explained that educators may exert greater control over student expression that occurs as a part of the curriculum in order "to assure that participants learn whatever lessons the activity is designed to teach."[153]

In light of the foregoing principles, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and

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[145] *Bethel*, 478 U.S. at 685.

[146] 484 U.S. 260 (1988).

[147] *Id.* at 263.

[148] *Id.*

[149] *Id.* at 264.

[150] For a discussion of the distinctions between public forums, limited public forums, and non-public forums, see 16A AM JUR. 2D *Constitutional Law* §§ 540–543 (2010).

[151] *Hazelwood*, 484 U.S. at 271.

[152] *Id.* at 270.

[153] *Id.* at 271.

content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[154] Applying this holding to the facts of the case, the Court concluded that it was reasonable for the principal to delete the at-issue articles from the newspaper, and therefore the principal had not violated the First Amendment.

3. Morse v. Frederick

The final case in the Supreme Court's line of student speech cases is *Morse v. Frederick*.[155] The Olympic Torch Relay proceeded along a street in front of Juneau-Douglas High School, and the school's principal permitted students to observe the relay from either side of the street.[156] As the torchbearers passed by, a group of students unfurled a fourteen-foot banner that read: "BONG HiTS 4 JESUS."[157] The principal demanded that the banner be taken down, and everyone but Joseph Frederick complied.[158] The school suspended Frederick for failure to comply with the principal's order.[159] The principal and other school administrators claimed that Frederick was asked to take the banner down because it advocated drug use.[160]

The Supreme Court agreed that Frederick's message could reasonably be interpreted as advocating drug use.[161] Accordingly, the Court framed the issue as "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[162] The Court stated that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest."[163] The Court then discussed the evils of drug use at length and acknowledged that "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use."[164]

The Court ultimately concluded that "[t]he 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[165]

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[154] *Id.* at 273.
[155] 551 U.S. 393 (2007).
[156] *Id.* at 397.
[157] *Id.*
[158] *Id.* at 398.
[159] *Id.*
[160] *Id.*
[161] *Morse*, 551 U.S. at 402.
[162] *Id.* at 403.
[163] *Id.* at 407 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).
[164] *Id.* at 408.
[165] *Id.* at 408 (citation omitted).

Thus, *Morse* represents a continuation of the Court's move away from the speech-protective spirit of *Tinker*. According to Erwin Chemerinsky, "*Morse* takes the *Hazelwood* distinction between curricular and non-curricular and finds that deference to school officials should extend to all official school activities."[166] *Morse* also demonstrates the Court's continued support for the character building vision of public education.[167]

C. *The Student Speech Doctrine*

The student speech cases occupy a special niche in the Court's First Amendment jurisprudence. First Amendment analysis of a restriction on speech usually begins with a determination of whether the restriction is content-based or content-neutral.[168] The Court also typically considers whether a restriction constitutes a prior restraint on speech[169] and the nature of the forum in which the restriction is implemented[170] in assessing the constitutionality of a speech restriction.

In the student speech cases from *Tinker* to *Morse*, the Court did not discuss the distinction between content-based and content-neutral restrictions,[171] nor did it seem to consider whether the restrictions at issue were prior restraints.[172] The *Hazelwood* Court appeared to engage in forum analysis in characterizing the school newspaper as a non-public forum, but this characterization seems inconsistent with traditional forum analysis. The student newspaper in *Hazelwood* is "fundamentally different from traditional non-public forums in that it is a place created for speech purposes. A newspaper, unlike say a military base or an airport, exists for speech purposes."[173]

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[166] Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 830 (2009).

[167] *Morse*, 551 U.S. at 397 ("[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.").

[168] *See supra* Part III.A.

[169] CHEMERINSKY, *supra* note 86, at 949 ("The Supreme Court frequently has said that '[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" (quoting N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971))). For a discussion of what constitutes a prior restraint, see *id.* at 949–53.

[170] *Id.* at 1124 ("The Court has dealt with [the issue of what property is available for speech] by identifying different types of government property—public forums, limited public forums, and nonpublic forums—and by articulating different rules as to when the government can regulate each."). For a discussion of forum analysis, see *id.* at 1126–44.

[171] *But see supra* notes 95–97 and accompanying text (describing the circuit split over the types of restrictions to which *Tinker* applies).

[172] CHEMERINSKY, *supra* note 86, at 1153 ("[T]he issue [in *Hazelwood*] was one of prior restraint of a school newspaper—a type of government control that generally would warrant strict scrutiny.").

[173] Chemerinsky, *supra* note 166, at 834–35.

Nevertheless, while it is currently unclear how the student speech cases fit into a unified, coherent analytical framework,[174] there are guiding principles to be derived from the cases discussed above.[175] There are five principles of particular importance to the analysis of English-only rules in public schools.

1. *The Interests of Students Are Balanced Against Those of Schools and Society*

In determining whether student speech is protected by the First Amendment, the Court balances the interests of the student against those of the school and society. Students have a First Amendment interest in free speech and expression. In any given situation, schools and society have a variety of interests at stake, each of which is discussed below.

According to the *Tinker* line of cases, it seems that the balancing process is quite simple—if a school can establish that a restriction serves any one of its

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[174] *See* Morse v. Frederick, 551 U.S. 393, 404 (2007) ("The mode of analysis employed in *Fraser* is not entirely clear."); 1 RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION 375 (2004) ("The *Hazelwood* Court's application of forum analysis to the school environment and the absence of such analysis in the *Tinker* decision . . . have left the lower courts the unenviable task of determining how the *Tinker* holding works, if at all, with forum analysis and whether the two are consistent."); Curtis G. Bentley, *Student Speech in Public Schools: A Comprehensive Analytical Framework Based on the Role of Public Schools in Democratic Education*, 2009 BYU EDUC. & L.J. 1, 3 (arguing that the Court has rejected a broad interpretation of *Tinker*, but has "offered no comprehensive approach to public school student free speech rights in its place"); Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 721 (2009) ("Confronted with holdings that lack justification or doctrinal continuity, courts do not know what [the rules from *Tinker* and *Hazelwood*] mean or how they are to be applied. They do not know how *Tinker* and *Hazelwood* fit into the free speech framework that applies everywhere else outside of the public school environment."); Chemerinsky, *supra* note 124, at 542 (stating that lower court student speech cases "follow no consistent pattern"); R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 684 (2009) ("*Tinker* does not easily fit into modern forum analysis applied outside of school settings.").

[175] *See Morse*, 551 U.S. at 404 ("We need not resolve this debate [over the meaning of *Fraser*] to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles."). For scholarly attempts to create a framework for student speech cases, see Bentley, *supra* note 174, at 35 (arguing for a "democratic education approach" to student speech according to which students have a First Amendment right to speak at school "only when it is clear that repression of their speech could not reasonably serve the goals of democratic education"), Brownstein, *supra* note 174, at 721–22 (arguing that school-sponsored activities should be characterized as a "Nonforum" in which government restrictions on speech are not subject to the Free Speech Clause), and Chemerinsky, *supra* note 166, at 830 (suggesting a framework based on the distinction between curricular and non-curricular activities).

legitimate interests, it wins. The challenge for school officials is to establish a connection between the restriction and a legitimate interest.

2. *Students Have a Limited Interest in Free Speech*

Students have a limited interest in freely expressing themselves. Two significant factors typically affect the weight of this interest in free expression. First, it is diminished by the "special characteristics of the school environment."[176] Thus, speech may be restricted in the public school context which could not be constitutionally restricted elsewhere.[177] Second, the weight of a student's interest in free expression will depend, to some extent, on the vision of public education adopted by the court. A court that subscribes to the marketplace vision of public education, such as the *Tinker* Court, is likely to weigh this interest rather heavily. On the other hand, a court that adopts the character building vision of public education, such as the *Fraser* Court, is likely to attribute decreased weight to this interest. In light of the Supreme Court's continued move toward the character building vision, it would appear that students' interest in free speech is more limited than ever.[178]

3. *Schools and Society Have a Variety of Interests Potentially Affected by Student Speech*

Schools and society have a number of interests that may be impacted by student speech. *Tinker* indicates that schools have an interest in operating free of material and substantial disruption. *Fraser* stands for the proposition that schools have an interest in inculcating in students the habits and manners of civility. *Fraser* also indicates that society has an interest in teaching students the boundaries of socially appropriate behavior and protecting minors from vulgar and offensive speech. In *Morse*, the Court concluded that the schools and society have an interest in deterring drug use among schoolchildren. And

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[176] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[177] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986).

[178] Calvert, *supra* note 124, at 1169 ("[L]ower courts post-*Morse* are side-stepping *Tinker*'s traditional and rigorous substantial-and-material disruption standard and substituting, in its place, the Supreme Court's ruling in *Morse* to automatically squelch student speech that allegedly threatens violence."); Chemerinsky, *supra* note 124, at 539 ("*Bethel* and *Hazelwood* are far more similar to Justice Black's dissent in *Tinker* which stresses the minimal protection for student speech and the need for great judicial deference to the expertise and authority of school officials."). Some lower courts have also narrowly interpreted *Tinker* so as to limit its reach. For instance, the Sixth Circuit recently held that *Tinker* is limited to viewpoint-based restrictions. M.A.L. *ex rel.* M.L. v. Kinsland, 543 F.3d 841, 849–50 (6th Cir. 2008). This is despite the fact that the doctrine of viewpoint discrimination "was only latent in *Tinker*." Perry A. Zirkel, *The Rocket's Red Glare: The Largely Errant and Deflected Flight of* Tinker, 38 J.L. & EDUC. 593, 601 (2009). However, other circuit courts have interpreted *Tinker* more broadly. *See supra* note 97 and accompanying text.

finally, *Hazelwood* indicates that schools have an interest in prescribing and controlling their curricula.

4. *The* Tinker *Anti-Disruption Standard Is Relatively Strict*

The standard announced in *Tinker* is relatively strict and offers limited deference to the discretion of school officials.[179] There are two aspects of this standard that make it highly speech-protective. First, schools may not restrict student speech in response to just any disruption—the disruption or potential disruption must be *material* and *substantial.* Second, school officials may constitutionally restrict speech to prevent a potential disruption only where there are circumstances that would *reasonably* lead them to forecast a material and substantial disruption.[180] The Court in *Tinker* elaborated on this aspect of the standard by explaining that an undifferentiated fear of disruption is not sufficient to justify a restriction on student speech.[181]

5. *School Authorities Have Broad Authority to Restrict Speech in the Context of the Curriculum*

Under the Court's holding in *Hazelwood,* school officials have broad authority to restrict student speech in the context of the curriculum. To justify such a restriction, a school need only show that the restriction is reasonably related to a legitimate pedagogical concern. The Court has gone so far as to hold that school authorities may restrict student speech during curricular activities that they would not be able to restrict otherwise.[182] Thus, the interest of school

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[179] Chemerinsky, *supra* note 166, at 838 ("The burden is on the school to prove the need for restricting student speech, and the standard is a stringent one—there must be proof that the speech would 'materially and substantially' disrupt the school.").

[180] Many lower courts have kept with the speech-protective spirit of *Tinker* by interpreting this aspect of the standard narrowly. For instance, a district court stated, "A school district can justify a policy [restricting speech] where it can demonstrate a concrete threat of substantial disruption that is linked to a history of past events." Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 705 (W.D. Pa. 2003) (citing Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 262 (3d Cir. 2002)); *see also* Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 530 (9th Cir. 1992) (holding that a school's demand that high school students remove buttons protesting the hiring of "scabs" during a teachers' strike may have violated the First Amendment on the ground that the buttons were not inherently disruptive); Chemerinsky, *supra* note 166, at 839 ("The court must independently review the facts and determine whether there is sufficient evidence of significant disruptive effect to justify punishing expression.").

[181] *Tinker*, 393 U.S. at 514.

[182] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (stating that educators may exert greater control over student expression that occurs as a part of the curriculum); *see also* Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) (plurality opinion) (stating that school authorities may have absolute discretion in inculcating community values in the context of the curriculum, while they do not have such discretion in other contexts).

authorities in controlling the content and implementation of the curriculum represents a major limitation on the free speech rights of students. Part V explores the nature of this interest and its implications for student speech.

V. SCHOOL AUTHORITIES' INTEREST IN CONTROLLING THE CURRICULUM

School authorities have a significant interest in controlling the content and implementation of their curricula, for "under the Supreme Court's precedents, the curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere."[183] Accordingly, courts give great weight to the interest of school authorities in controlling the curriculum. In fact, the Court gives more weight to this interest than the interest of schools in preventing material and substantial disruption. This difference in weight is reflected in the modes of analysis employed by the Court in each context. With respect to prevention of material and substantial disruption, the Court demands that schools make a reasonable forecast of such disruption before restricting student speech.[184] Additionally, schools are not entitled to respond to any and all disruptions—the disruption must be *material* and *substantial*.[185] Thus, school officials are afforded little discretion with respect to speech restrictions implemented to prevent disruption.

In contrast to this rather strict standard is the highly deferential standard applied to speech restrictions in the context of the school curriculum.[186] To justify such a restriction, a school must merely show that the restriction is "reasonably related to legitimate pedagogical concerns."[187] Moreover, "lower courts have generally given wide latitude to school claims of curricular pedagogical concerns."[188] The Court itself has acknowledged that restrictions

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[183] Brown v. Li, 308 F.3d 939, 951 (9th Cir. 2002); *see also* Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (stating that no "challenge [has] been made of the State's power to prescribe a curriculum for institutions which it supports").

[184] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) ("[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . .").

[185] *Id.*

[186] Chemerinsky, *supra* note 166, at 825 ("Courts in recent years have provided little protection for student speech, least of all when it is involved in curricular activities.").

[187] *Hazelwood*, 484 U.S. at 273; *see also* SCHNEIDER, *supra* note 174, at 397–98 (explaining that the Court in *Hazelwood* held that a school "may restrict 'in any reasonable manner' the content of speech which bears the imprimatur of the school as long as such limitation is reasonably related to legitimate pedagogical concerns" and that "[a] school's curriculum bears the imprimatur of the school").

[188] SCHNEIDER, *supra* note 174, at 400 (citing Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) ("Local school officials, better attuned than we to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted . . . .")).

on student speech in the context of the school curriculum are subject to a highly deferential constitutional standard.[189]

Thus, the interest in curricular control has significant implications for the protection of student speech. There are two free speech cases in which the Supreme Court has discussed the interest of public school authorities in controlling the curriculum—*Hazelwood School District v. Kuhlmeier*[190] and *Board of Education v. Pico*.[191] Both cases shed light on the nature and scope of the curriculum and the weight of school authorities' corresponding interest in curricular control.[192]

A. Board of Education v. Pico

Pico involved a challenge to the removal of certain books from public school libraries carried out by a school district's board of education. Several board members obtained a list of allegedly objectionable books and later discovered that a number of the listed books appeared in the high school and junior high school libraries.[193] The board members read each of these books and concluded that most of them should be removed from the libraries and from use in the school curriculum.[194]

The Court's analysis, in a plurality opinion written by Justice Brennan, began by asserting that the right of public school authorities to prescribe and control the curriculum was not being challenged in this case.[195] The Court noted that "the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading."[196] The Court also highlighted the fact that the school board was not being asked to *add* books to the library, but instead the only action being challenged was the *removal* of books from

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[189] *Hazelwood*, 484 U.S. at 271 (characterizing a school newspaper as part of the school curriculum and stating that "[e]ducators are entitled to exercise greater control over this . . . form of student expression to assure that participants learn whatever lessons the activity is designed to teach"); Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) (plurality opinion) (stating that a school board does not have absolute discretion to inculcate community values through control of the content of school libraries, but suggesting that the board might have such control in matters of curriculum).

[190] 484 U.S. at 271–72.

[191] 457 U.S. at 853–54 (plurality opinion).

[192] A brief discussion of *Pico* follows. For an examination of *Hazelwood*, see *supra* Part IV.B.

[193] *Pico*, 457 U.S. at 856 (plurality opinion).

[194] *Id.* at 858.

[195] *Id.* at 862 ("Respondents do not seek in this Court to impose limitations upon their school Board's discretion to prescribe the curricula of the Island Trees schools."). In the lower courts, respondents did challenge the portion of the board's resolution that required removal of the banned books from the school's curriculum, but these challenges were not at issue in the appeal before the Supreme Court. *Id.* at 862 n.18.

[196] *Id.* at 862.

school libraries.[197] The Court then explained that the scope of the case was further limited by its procedural posture and proceeded to narrowly frame the issue as whether "the First Amendment impose[s] *any* limitations upon the discretion of petitioners to remove library books from the Island Trees High School and Junior High School[.]"[198]

The school board defended itself by emphasizing what was referred to above as the character building vision of public education and arguing "that they must be allowed *unfettered* discretion 'to transmit community values'" to students.[199] The Court rejected this position and pointed to the distinction between the curriculum and other school contexts:

> Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.[200]

The Court's analysis in *Pico* illustrates the heightened level of deference afforded to school authorities with respect to curricular matters. The Court went so far as to suggest that the board might have *absolute discretion* to inculcate community values in the context of the curriculum. This is a striking departure from the relatively demanding standard announced in *Tinker*.

B. *The Curriculum Doctrine*

Pico and *Hazelwood* demonstrate that states and schools have a strong interest in prescribing and controlling the school curriculum. Furthermore, both cases shed light on two key aspects of the Court's curriculum doctrine. First, they help define the scope of the curriculum. Second, they illustrate the weight and scope of school authorities' interest in controlling and implementing the curriculum.

1. *The Scope of the Curriculum*

The Court in *Hazelwood* defined a school's curriculum as the activities that "are supervised by faculty members and designed to impart particular knowledge or skills to student participants."[201] Moreover, such activities need not occur in a traditional classroom setting in order to be part of the

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[197] *Id.*

[198] *Id.* at 863.

[199] *Pico*, 457 U.S. at 869 (plurality opinion).

[200] *Id.*

[201] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988); *see also* SCHNEIDER, *supra* note 174, at 391–92.

curriculum.[202] *Pico* clarifies which activities are included within the curriculum. In characterizing the school library as extra-curricular, the Court focused on the voluntary nature of the student activity that goes on in the school library.[203] This was contrasted with the "compulsory environment of the classroom."[204]

This contrast further illuminates the meaning of the phrase "supervised by faculty members" from the *Hazelwood* definition. Interpreting that phrase broadly, it seems likely that a student trip to the library would come within the *Hazelwood* definition. After all, teachers often accompany students to the library and monitor their behavior. Also, librarians typically monitor student conduct in the library, and they are generally considered faculty members. However, *Pico* suggests that "supervised" ought to be interpreted more narrowly, such that a teacher must control the details of the student activity in order to fit the *Hazelwood* definition. This narrower construction is entirely consistent with the *Hazelwood* Court's characterization of the school newspaper as part of the curriculum. The newspaper in *Hazelwood* was "taught by a faculty member during regular class hours" and students were graded on their performance.[205] Furthermore, the journalism teacher "exercised a great deal of control over [the newspaper]."[206]

2. *The Scope of the Interest in Curricular Control*

The scope and weight of this interest is reflected by the highly deferential standard applied to restrictions on student speech in the context of the curriculum.[207] In order to justify such a restriction, school officials must demonstrate that the restriction is "reasonably related to legitimate pedagogical concerns."[208] Such pedagogical concerns include "assur[ing] that [students] learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[209] Dicta from *Pico* suggests that the inculcation of community values is also a legitimate pedagogical concern.[210]

This highly deferential standard allows school authorities to restrict student speech during curricular activities that they would not be able to restrict otherwise. For example, the school authorities in *Hazelwood* had the

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[202] *Hazelwood*, 484 U.S. at 271.

[203] *Pico*, 457 U.S. at 869 (plurality opinion) (discussing the "regime of voluntary inquiry that there holds sway" over the library).

[204] *Id.*

[205] *Hazelwood*, 484 U.S. at 268.

[206] *Id.* (internal quotation marks omitted).

[207] *See* SCHNEIDER, *supra* note 174, at 394 ("Judicial deference to school authorities is perhaps greatest when the matter under scrutiny involves the curriculum.").

[208] *Hazelwood*, 484 U.S. at 273.

[209] *Id.* at 271.

[210] Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) (plurality opinion).

constitutional authority to exclude from the school newspaper "speech that is . . . ungrammatical, poorly written, inadequately researched, [or] biased or prejudic[ial],"[211] while they could not restrict such speech in other contexts.[212]

VI. APPLYING THE FIRST AMENDMENT TO ENGLISH-ONLY RULES IN PUBLIC SCHOOLS

Parts IV and V offered an overview and analysis of Supreme Court precedents that bear on the constitutionality of English-only rules as applied to students in public schools. These precedents suggest that the constitutionality of an English-only rule under the First Amendment will depend to a large extent on the school's reason for enacting the rule. Three of the most common reasons asserted for the implementation of English-only rules are preventing disruption and bullying,[213] acquiring and developing English-language skills,[214] and promoting English as a common language.[215] Each of these justifications is analyzed individually according to the First Amendment doctrines examined in Parts IV and V.

A. *Preventing Disruption and Bullying*

Under *Tinker*, schools may restrict the use of languages other than English if they reasonably believe that such use will "substantially interfere with the work of the school or impinge upon the rights of other students."[216] *Tinker* indicates that "undifferentiated fear or apprehension of disturbance" is not sufficient to justify a speech restriction.[217] The Court's decision in *Tinker* was based, in large part, on the fact that the record in the case "[did] not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[218] Thus, a school must provide factual support for its conclusion that an English-only rule is necessary to prevent disruption and maintain order and discipline.

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[211] *Hazelwood*, 484 U.S. at 271.

[212] *Id.* (stating that educators may exercise "greater control" over student speech that occurs during curricular activities).

[213] Silva v. St. Anne Catholic Sch., 595 F. Supp. 2d 1171, 1175 (D. Kan. 2009) (stating that defendants claim their English-only rule was enacted to "combat bullying, name-calling, and put-downs").

[214] *Id.* (The court quotes a letter from the school principal to parents explaining that "[s]ince all subjects are taught in English then [the students] need strengthening in that area. The more students are immersed in English language the better the chance for improvement/success.").

[215] *See* Ruiz v. Hull, 957 P.2d 984, 1001 (Ariz. 1998) (stating that the goal of an official English Amendment to the state constitution was "to promote English as a common language").

[216] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

[217] *Id.* at 508.

[218] *Id.* at 514.

1. *English-Only Rules Targeted at Disruption and Bullying Are Unconstitutional Absent a Record of Language-Related Disruption*

The Court's opinion in *Tinker* does not indicate precisely what type or amount of factual support is necessary to adequately justify a restriction on student speech. The Court used the term "undifferentiated" to describe the sort of fear or apprehension that would *not* be adequate to justify a restriction on speech.[219] The meaning of this term is somewhat unclear, but it seems that the term is used to describe a highly speculative fear or apprehension. Assuming that this is the case, the question for school officials is, "How speculative is too speculative?"

The facts of *Tinker* shed some light on this question. The case involved a group of students who were sanctioned by school officials for wearing armbands symbolizing their opposition to the Vietnam War.[220] The school officials claimed that they prohibited the armbands out of fear that the bands would cause a disturbance at the school, but the school officials did not provide a factual basis for their fear.[221]

Under these circumstances, the apprehensions of the school officials do indeed seem highly speculative. The armbands did not represent a direct threat to the authority of the teachers or school officials. For instance, the students were not using the armbands as a symbol to ridicule teachers or officials. Nor did the armbands appear to indirectly undermine the ability of school officials to maintain order—there was no record of student disruption at the school caused by the discussion of controversial issues such as the Vietnam War. The only basis for the school officials' apprehension was a general concern that student expression related to a morally and politically controversial topic may lead to conflict and disruption among the students.[222]

This highly speculative apprehension is to be compared to that in the case of an English-only rule applied to students with no history of language-related

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[219] *Id.* at 508.

[220] *Id.* at 504.

[221] *Id.* at 508.

[222] The highly speculative nature of this apprehension is highlighted by examining the assumptions on which it is based. To justify the school officials' apprehension, it must be assumed that students will express their opinions about the at-issue armbands in such a way as to either disrupt school functions themselves or to elicit disruptive behavior from others. This is where the link between the armbands and the potential disruption becomes rather tenuous. The nature of the response to the armbands will depend greatly on the idiosyncrasies of individual students and the social dynamics among the student body. The best indicator of these idiosyncrasies and dynamics—and probably the only indicator available to school officials—is the history of student behavior at the school. In the case of *Tinker*, this history offered no indication that students would respond to the armbands in such a way as to create a disruption. Thus, the school officials' apprehension was based on an unsubstantiated assumption that students would respond to the armbands in a disruptive fashion.

disruption or bullying.[223] The apprehension in this case seems somewhat less speculative than that in *Tinker* for one primary reason. Assuming that a given teacher is a monolingual speaker of English, students speaking languages other than English may constitute a threat to the teacher's authority in the classroom. It creates a sphere of activity over which the teacher has diminished control because he or she is unable to understand what is being communicated. It is analogous to a space in a classroom that is veiled from the teacher's sight. The question is whether this threat is substantial enough to justify the imposition of an English-only rule.

As a hypothetical possibility, unsubstantiated by factual support, the mere risk that students' non-English speech will undermine a teacher's authority and cause disruption should not be sufficient to justify an English-only rule. While teachers have an obligation to maintain control over their classrooms and prevent bullying, it is a fact of life that teachers are not always aware of everything that is going on in the classroom. Contrary to the popular idiom, teachers do not have "eyes in the backs of their heads," nor do they have bat-like hearing. Any time a teacher turns away from the class to write on a chalkboard, he or she experiences diminished control over the classroom. Whenever students speak to one another in hushed tones, the teacher's control is diminished. A visit to the restroom or the water fountain will typically remove students from teacher supervision, temporarily suspending the teacher's control.

These scenarios, and numerous others, represent circumstances under which teachers have little to no control over their students, yet they are matters of everyday occurrence at schools across the nation. If temporary loss of control over student behavior, as a general matter, created a substantial risk of material disruption of school functions, one would expect to find few teachers using chalkboards or white boards. One would expect trips to the restroom to be heavily regulated and trips to the water fountain perhaps prohibited. It seems likely that bans on whispering, or perhaps even speaking out of earshot of a teacher, would be common. This, of course, is not the case. These temporary diminutions in teacher control are accepted as inevitable, and teachers generally do not need to exert complete control over every detail of student behavior in order to maintain order and prevent bullying. Use of a foreign language is simply one more student activity over which teachers do not have complete control. Thus, English-only rules implemented for the purpose of preventing disruption before it occurs should be held unconstitutional under the First Amendment as they are based on the very sort of undifferentiated fear rejected by the Court in *Tinker*.

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[223] The phrase "language-related disruption and bullying" as used in this Note refers to disruption and bullying facilitated by the use of a language other than English. For instance, Spanish-speaking students might ridicule other students in Spanish without their non-Spanish-speaking teacher understanding.

2. *English-Only Rules May Be Constitutional Where a Record of Language-Related Disruption or Bullying Exists*

Where school officials are confronted with a record of student disruption or bullying facilitated by the use of a language other than English, an English-only rule may be justified under the First Amendment, to the extent that it is reasonably related to addressing the target behavior. The rule's constitutionality will depend in part on whether it is applied to a multilingual speaker of English or to a non-English-speaking student.[224] These two classes of students are considered separately below.

a. *Multilingual Speakers of English*

For this class of students,[225] whether to speak English is presumably a choice, at least to some extent. The constitutionality of an English-only rule—as applied to these students—will depend primarily on the extent to which it is reasonably related to preventing material disruption of school functions.[226] In turn, the reasonableness of this relationship will vary depending on whether the rule is applied exclusively to those students who have created language-related disruptions or to a wider class of students.

i. *English-Only Rules Applied Exclusively to Disruptive Students*

English-only rules applied exclusively to students with a history of creating language-related disruptions should generally be constitutional[227] under *Tinker*.

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[224] The dichotomy between "multilingual speakers of English" and "non-English-speaking students" oversimplifies the nature of linguistic fluency to some extent. In reality, a person's fluency in a given language falls somewhere along a continuum, from complete inability to speak to mastery of the language. *See* Jim Cummins, *Language Proficiency, Bilingualism, and Academic Achievement*, *in* THE MULTICULTURAL CLASSROOM 16, 16–24 (Patricia A. Richard-Amato & Marguerite Ann Snow eds., 1991). However, for purposes of constitutional analysis, it is necessary to determine whether a given restriction leaves open alternative means of communication. *See infra* Part VI.A.2.b.i. The dichotomy between "multilingual" and "non-English-speaking" serves as an analytical tool for determining whether a student who is required to speak English has any means for communication. The concept "non-English-speaking student" could be operationally defined in a variety of fashions. For ways in which to conceptualize and define language proficiency, see SUZANNE F. PEREGOY & OWEN F. BOYLE, READING, WRITING, AND LEARNING IN ESL 34–35 (5th ed. 2008), and Cummins, *supra*, at 16–24.

[225] Throughout the rest of this Note, multilingual speakers of English will be referred to as "multilingual students."

[226] *See supra* text accompanying notes 180–81.

[227] As used throughout the remainder of this Note, the term "constitutional" refers only to constitutionality under the First Amendment. Even where an English-only rule is constitutional under the First Amendment, it may still be unconstitutional under the Fourteenth Amendment.

School officials must reasonably forecast disruptive behavior before restricting student speech.[228] Lower courts have held that a forecast is reasonable where is it based on "a concrete threat of substantial disruption that is linked to a history of past events."[229] For instance, the Tenth Circuit held that a school could prohibit the display of the Confederate flag where the school had previously "'experienced a series of racial incidents or confrontations . . . some of which were related to the Confederate flag.'"[230] Thus, a record of language-related disruption should justify an English-only rule as applied to the previously disruptive student or students.

ii. *English-Only Rules Applied to a Wider Class of Students*

In some cases, a teacher may find it difficult to address disruptive behavior with an English-only rule targeted at individual students. For instance, suppose there is a class of twenty students, all of whom speak both English and Spanish during class on a regular basis. The teacher speaks only English, and five of the students repeatedly use Spanish to ridicule the teacher and their classmates. The teacher is unable to effectively confront this misbehavior because she does not understand what is being said. She decides to address the problem by imposing an English-only rule on the entire class.

A class-wide rule such as this is subject to constitutional attack as applied to non-disruptive students.[231] To withstand such an attack, the rule must be reasonably related to the prevention of material and substantial disruption.[232] In the hypothetical classroom described above, this standard is probably satisfied. There was a record of language-related disruption, thus it is reasonable for the

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[228] *See supra* text accompanying note 216–18.

[229] Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 705 (W.D. Pa. 2003).

[230] West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000) (quoting West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1231–34 (D. Kan. 1998)). The court in *West* noted that, while "'a full-fledged brawl had not yet broken out over the Confederate flag,'" that did not mean "'that the district was required to sit and wait for one.'" *Id.* (quoting *West*, 23 F. Supp. 2d at 1231–34).

[231] A class-wide rule would also be subject to constitutional attack by the disruptive students to whom it applies under the doctrine of overbreadth. I have omitted an extended discussion of the doctrine of overbreadth, primarily because it would be fairly redundant with the analysis that immediately follows this footnote. For an explanation of the doctrine, see CHEMERINSKY, *supra* note 86, at 943–48. For purposes of this Note, the most important thing to know about the doctrine of overbreadth is that it represents an exception to the ordinary requirements of standing. *Id.* at 943–44. Thus, a student responsible for creating language-related disruption could challenge the constitutionality of a class-wide English-only rule based on the rule's impact on the Free Speech rights of *non-disruptive students*. Under the doctrine, an English-only rule would be unconstitutional on its face if it was so broad that it might suppress the constitutionally protected speech of third parties. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984).

[232] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (stating that the First Amendment permits "reasonable regulation of speech-connected activities in carefully restricted circumstances").

teacher to limit the disruptive students' use of Spanish.[233] Furthermore, it would probably be impossible for the teacher to individually tailor the ban on Spanish speaking, for she will likely be unable to tell which students are speaking Spanish at any given time. Therefore, a class-wide English-only rule should be constitutional under these circumstances.

However, a class-wide rule may be unconstitutional as applied to non-disruptive students where circumstances are such that the teacher could keep track of individual students' use of Spanish. For instance, the number of disruptive students might be so few that the teacher could individually monitor their language use with relative ease. In terms of our hypothetical classroom, suppose there were only one or perhaps two disruptive students rather than five. Or, in a similar vein, the number of Spanish-speaking students in a given class might be small enough that the teacher could effectively monitor the use of Spanish by disruptive students. For example, suppose our hypothetical class included six Spanish-speaking students, four of whom had a record of language-related disruptive behavior. There would be no need for a class-wide rule under these circumstances, for the teacher could tell which students are speaking Spanish at any given time, especially if she seats them strategically.[234]

In sum, where enforcement of an English-only rule on an individual basis would be impracticable, applying it to the entire class should generally be constitutional. However, the situation becomes more complicated when a class-wide English-only rule is applied to a class that includes non-English-speaking students.

b. *Non-English-Speaking Students*

Non-English-speaking students do not have the choice to speak English in conformity with an English-only rule. Therefore, such a rule amounts to a complete ban on linguistic expression for these students. According to the principles announced by the Supreme Court in *Turner v. Safley*,[235] an English-only rule should be unconstitutional under these circumstances.

i. Turner *and the First Amendment Rights of Prisoners*

Turner involved a challenge to the constitutionality of a prison policy that limited the right of inmates to marry and engage in correspondence with other

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[233] *See supra* text accompanying notes 133 and 180.

[234] Determining whether a teacher is able to individually monitor students' language use will clearly involve a highly fact-intensive inquiry. The decision reached by a given court will likely depend significantly on whether the court subscribes to the marketplace vision of education or the character building vision. *See id.* The declining vitality of *Tinker* suggests that courts will generally be inclined to defer to the judgment of teachers on this matter. *See supra* note 178 and accompanying text.

[235] 482 U.S. 78, 89–90 (1987).

inmates.[236] A class of inmates brought suit, claiming that the policies violated its constitutional rights.[237] The Court explained that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[238] The Court then enumerated four factors to consider in assessing the reasonableness of a prison regulation: (1) whether there is a rational connection between the regulation and the government interest asserted as a justification for it; (2) whether other avenues remain open for the exercise of the asserted right; (3) the impact that accommodating the asserted right will have on guards, inmates, and the allocation of prison resources; and (4) whether there exist ready alternatives to the challenged regulation.[239]

Applying the above factors to the facts of the case, the Court held that the ban on inmate-to-inmate correspondence did not violate the inmates' constitutional rights.[240] The Court pointed to the fact that "the correspondence regulation does not deprive prisoners of all means of expression. Rather, it bars communication only with a limited class of other people with whom prison officials have particular cause to be concerned . . . ."[241] The Court also noted that there were no ready alternatives to the policy adopted by the prison.[242]

On the other hand, the Court concluded that the restrictions placed on inmates' right to marry did violate their constitutional rights.[243] In reaching this holding, the Court relied heavily on the finding that "[t]here are obvious, easy

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[236] *Id.* at 81–82. For a discussion of the similarities between prisons and schools for purposes of the First Amendment, see CHEMERINSKY, *supra* note 86, at 1146 ("The Court has held that some government operated places are environments where great deference is required to regulations of speech. Specifically, the Court generally has sided with the government when regulating expression in the military, in prisons, and in schools." (citing GEOFFREY STONE ET AL., CONSTITUTIONAL LAW, 1362–69 (3d ed. 1996))), and Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71, 71 (2010) (discussing the similarities and differences between prisons and schools in the context of the First Amendment). *See also* Citizens United v. FEC, 130 S. Ct. 876, 899 (2010) (identifying "a narrow class of speech restrictions that operate to the disadvantage of certain persons," which are "based on an interest in allowing governmental entities to perform their functions," and offering school and prison restrictions as examples); Procunier v. Martinez, 416 U.S. 396, 409–10 (1974) (quoting *Tinker* for the proposition that First Amendment guarantees must be applied in light of the special characteristics of the environment); Ala. & Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1323–24, 1332 (E.D. Tex. 1993) ("[P]rison cases, while not controlling in the context of public schools, are instructive on the issue . . . .").

[237] *Turner*, 482 U.S. at 81–82.

[238] *Id.* at 89.

[239] *Id.* at 89–90.

[240] *Id.* at 93.

[241] *Id.* at 92.

[242] *Id.* at 93 (stating that "the only alternative proffered by the claimant prisoners, the monitoring of inmate correspondence, clearly would impose more than a *de minimus* cost on the pursuit of legitimate corrections goals").

[243] *Turner*, 482 U.S. at 99.

alternatives to the Missouri regulation that accommodate the right to marry while imposing a *de minimus* burden on the pursuit of security objectives."[244] The Court also found that the rule swept much more broadly than could be explained by the prison's penological objectives.[245]

The Eighth Circuit applied *Turner* to an English-only rule implemented by a prison in *Ortiz v. Fort Dodge Correctional Facility*.[246] Ortiz, an inmate at Fort Dodge Correctional Facility, challenged the prison's policy of permitting written communication in a foreign language only if that was the sole language in which an inmate could communicate.[247] Otherwise, inmates were required to write in English. Ortiz was fluent in English, thus he was generally required to write his letters to friends and family in English.[248] He was, however, permitted to write to his sister in Spanish because that was the only language she understood.[249] The court held that the rule did not violate Ortiz's freedom of speech and noted that "Ortiz had other avenues by which he could have communicated with his family members."[250]

ii. Turner *Should Be Applied in Public Schools*

The analysis employed in *Turner* and *Ortiz* should be applied to English-only rules in public schools.[251] Such an application is justified for several reasons. First, as noted above, the Court and commentators have acknowledged the connection between First Amendment doctrine in prisons and schools.[252] Second, the Free Speech analyses employed by the Court in the context of prisons and the public school curriculums are strikingly similar.[253] Third, while the reasonableness analysis developed in *Turner* is more similar to the *Hazelwood* analysis than *Tinker*'s anti-disruption analysis, this fact actually offers additional support for applying the *Turner* analysis to school rules

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[244] *Id.* at 98.

[245] *Id.* (noting that "prison officials testified that generally they had experienced no problem with the marriage of male inmates, and the District Court found that such marriages had routinely been allowed as a matter of practice . . . prior to adoption of the rule").

[246] 368 F.3d 1024, 1026–27 (8th Cir. 2004); *see also* Thongvanh v. Thalacker, 17 F.3d 256, 258–59 (8th Cir. 1994).

[247] *Ortiz*, 368 F.3d at 1025.

[248] *Id.*

[249] *Id.*

[250] *Id.* at 1027.

[251] To clarify, the *Turner* analysis should be imported into the context of public schools *at a minimum*. Students in public schools may be entitled to even more constitutional protection than that offered by *Turner*.

[252] *See supra* note 236.

[253] *Compare* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (restriction on student speech in the context of the curriculum must be "reasonably related to legitimate pedagogical concerns"), *with* Turner v. Safley, 482 U.S. 78, 89 (1987) (restrictions on inmates' constitutional rights must be "reasonably related to legitimate penological interests").

implemented to prevent disruption. The *Tinker* analysis is more speech-protective than the *Hazelwood* analysis.[254] Thus, it would be inconsistent to apply the speech-protective elements of the *Turner* analysis in situations where mere rational basis scrutiny applies, but not in situations where the more highly speech-protective *Tinker* analysis applies.

Under *Turner*'s four-factor analysis, an English-only rule applied to a monolingual student is unconstitutional.[255] First, *Turner* requires us to consider whether the restriction leaves open alternative channels of communication for the student. An English-only rule leaves open virtually no alternative channels for non-English-speaking students, at least no linguistic channels. Such a rule would essentially operate as a blanket ban on linguistic expression as applied to non-English-speaking students. In assessing the significance of this factor, it should be noted that even the prison in *Ortiz* did not go so far as to completely restrain non-English-speaking inmates from engaging in written communication—the prison's policy included an exception for inmates who were unable to communicate in English.[256]

Second, the *Turner* analysis involves consideration of whether there are ready alternatives to the challenged regulation that would impose no more than de minimis costs to valid educational interests.[257] Such alternatives do exist. In some cases, school authorities can place non-English-speaking students in classes headed by teachers who speak the students' languages. Where no such teachers are available, non-English-speaking students can be seated next to or grouped with non-disruptive students, so as to provide a positive influence and minimize the likelihood of disruption.[258] Where neither of these options adequately addresses students' disruptive behavior, teachers and other school officials can resort to various modes of behavior modification, such as positive reinforcement, negative reinforcement, and punishment.[259] The financial cost of these alternatives would be little more than the cost of an English-only rule, if

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[254] *See supra* Part IV.C.4–5; *see also* Caplan, *supra* note 236, at 81 ("Unlike *Turner*, *Tinker* requires more than a merely legitimate reason to restrict student speech.").

[255] The *Turner* analysis could also be applied to multilingual students, but it would not affect the constitutionality of an English-only rule as applied to them. First, multilingual students would have alternative means of communication because they are able to speak English. Second, the rule would not be overly broad as applied to multilingual students because it would not completely stifle their speech. The rule would only target an aspect of their speech that is related to its disruptive quality.

[256] *See supra* note 247 and accompanying text.

[257] *Turner*, 482 U.S. at 91.

[258] *See* Sandra Rief, *Strategies to Improve Self-Regulation*, *in* UNDERSTANDING AND MANAGING CHILDREN'S CLASSROOM BEHAVIOR, *supra* note 121, at 322, 340 ("Seating is a big environmental factor for inattentive and/or disruptive students. Providing preferential seating is an important accommodation.").

[259] For an overview of various methods of behavior modification, see Sam Goldstein & Robert Brooks, *Applying Behavior Modification*, *in* UNDERSTANDING AND MANAGING CHILDREN'S CLASSROOM BEHAVIOR, *supra* note 121, at 226, 226–78 (Sam Goldstein & Robert B. Brooks eds., 2d ed. 2007).

they are more costly at all.[260] Moreover, in some circumstances, these alternatives will provide more robust protection against disruption than would an English-only rule. For instance, if a student is suspended from school, his or her ability to disrupt school functions is all but eliminated.

Third, *Turner* requires us to consider whether there is a rational connection between the restriction and the government interest asserted as a justification. The Court in *Turner* held that the prison's restriction on inmate marriage was unconstitutional, in part because it was broader than could be explained by the prison's legitimate penological objectives.[261] An English-only rule applied to a non-English-speaking student suffers from a similar infirmity. Schools have a legitimate interest in preventing material disruption of school functions. However, an English-only rule applied to a non-English-speaking student restricts both disruptive and non-disruptive speech—it essentially silences the student. Thus, an English-only rule implemented under these circumstances is substantially broader than necessary to serve the schools' legitimate interest in preventing disruptive behavior.

Lastly, *Turner* asks us to consider the impact that accommodating the asserted right will have on teachers, other students, and the allocation of school resources. For our purposes, the asserted right is the right of students to linguistically express themselves. As discussed above, the impact on the allocation of school resources will probably be slight because there are ready and effective alternatives to English-only rules.[262] The impact on teachers and other students is likely to be small for the same reason.

Thus, according to the *Turner* analysis, an English-only rule applied to non-English-speaking students is not reasonably related to a school's legitimate interest in preventing disruption. Therefore, an English-only rule applied in these circumstances is unconstitutional.[263]

3. *Summing Up the Disruption and Bullying Analysis*

School authorities may constitutionally implement English-only rules where there is a record of language-related disruption or bullying. Such rules will most likely be valid as applied to the students responsible for the disruption and may

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[260] One could argue that providing for a faculty member to supervise punishments such as detention or in-school suspension would impose additional costs on a school district. However, this is not likely to be true in most cases. Schools typically have an established system for detention and in-school suspension, thus faculty members are needed to supervise these programs whether or not non-English-speaking students are suspended for their disruptive behavior. Thus, resorting to a punishment such as in-school suspension rather than imposing an English-only rule on disruptive students would create an additional cost for schools only where the volume of students so punished would be so high as to necessitate an additional faculty supervisor.

[261] *Turner*, 482 U.S. at 98.

[262] *See supra* notes 258–60 and accompanying text.

[263] By implication, this means that the class-wide English-only rules discussed in *supra* Part VI.B.2.a must include exceptions for non-English-speaking students.

be valid as applied to an entire class of students, depending on the practicability of monitoring individual students' language use. However, English-only rules may not be constitutionally applied to non-English-speaking students because to do so would leave them with no alternative channels of communication.

B. *Acquiring and Developing English-Language Skills*

Of the three justifications listed above, this is the only one that can reasonably be considered purely pedagogical in nature. The Supreme Court recognized English-language acquisition as a legitimate pedagogical concern when it stated that "students who do not understand English are effectively foreclosed from any meaningful education" in a school system where English proficiency is a graduation requirement.[264] Congress has also recognized English-language acquisition as a legitimate pedagogical concern by enacting the No Child Left Behind Act, which imposed a duty on public schools to ensure that English language learners attain proficiency in English.[265] Moreover, the importance of English language proficiency to Congress is reflected in the fact that the No Child Left Behind Act "significantly increased federal funding for education in general and *ELL programming in particular*."[266]

These authorities leave little doubt that English acquisition is a legitimate pedagogical concern. Under *Hazelwood*, a restriction on student speech in the context of the curriculum is constitutional so long as it is reasonably related to a legitimate pedagogical concern. Thus, where school authorities assert English-language development as a justification for an English-only rule, two issues must be resolved to determine whether the rule is constitutional. First, it must be determined whether the activities to which the rule applies come within the curriculum. Assuming that this condition is satisfied, it must then be determined whether the rule is reasonably related to English-language acquisition and development.

1. *Does the Activity Come Within the Curriculum?*

Hazelwood indicates that student activities come within the curriculum if they are faculty-supervised and designed to teach particular knowledge or skills. According to the Court's analysis in *Pico*, negligible faculty supervision will not suffice to bring an activity within the curriculum—a faculty member must control the details of the activity.

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[264] Lau v. Nichols, 414 U.S. 563, 566 (1974).

[265] 20 U.S.C. § 6812(1) (2006) (passed with the objective that ELL students "attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic standards as all children are expected to meet").

[266] Horne v. Flores, 129 S. Ct. 2579, 2602 (2009) (emphasis added).

In light of these principles, classroom instruction time would certainly come within the curriculum. According to *Hazelwood*, faculty-supervised newspapers come within the curriculum.[267] Field trips would also be likely to fall within the curriculum, for as the *Hazelwood* Court stated, an activity need not occur in the classroom setting to be curricular in nature.[268] *Hazelwood* also suggests that the curriculum includes theatrical productions.[269]

On the other hand, there are a number of school activities that most likely do not come within the curriculum. *Pico* indicates that student trips to the school library are generally not part of the curriculum.[270] However, a trip to the library would likely come within the curriculum if it was made in connection with a particular class and supervised by a faculty member. It seems quite likely that recess falls outside of the curriculum. While students are supervised during recess, they are not typically expected to learn any particular knowledge or skill during this time.[271] To include such activity in the curriculum would be contrary to the notion of recess as a break from instruction. In the same vein, lunchtime is most likely not included in the curriculum, for students are typically not expected to learn any particular knowledge or skill during this time. Other activities that probably fall outside the curriculum include walking through the halls unaccompanied by a teacher, going to one's locker, and riding on the school bus.

2. *Is the Restriction Reasonably Related to English-Language Acquisition and Development?*

It should be quite easy for school authorities to meet this requirement, at least for the time being. Congress not only set English language proficiency as a high priority by enacting the No Child Left Behind Act, but it also aimed to grant state and local educational agencies "the flexibility to implement language instruction educational programs, based on scientifically based research on teaching limited English proficient children."[272]

Thus, school authorities have broad discretion in how they approach the task of developing students' English language skills. Furthermore, the Court has

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[267] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[268] *Id.*

[269] *Id.*

[270] Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) (plurality opinion).

[271] For a discussion of the role recess plays in child development, see generally ANTHONY D. PELLEGRINI, RECESS: ITS ROLE IN EDUCATION AND DEVELOPMENT (2005). Pellegrini conducted experiments on the effect of recess on children's cognitive performance and found evidence suggesting that "in order to maintain high levels of attention, children need frequent breaks in the course of the day." *Id.* at 154. Thus, the beneficial effects of recess may be defeated if school officials were to engage students in instructional activity during recess time.

[272] 20 U.S.C. § 6812(9) (2006); *see also* Horne v. Flores, 129 S. Ct. 2579, 2603 (2009) ("NCLB grants States 'flexibility' to adopt ELL programs they believe are 'most effective for teaching English.'").

noted that "[r]esearch on ELL instruction indicates there is documented, academic support for the view that [Sheltered English Immersion] is significantly more effective than bilingual education."[273] According to the Sheltered English Immersion approach,

> nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. . . . Although teachers may use a minimal amount of the child's native language when necessary, no subject matter shall be taught in any language other than English, and children in this program learn to read and write solely in English.[274]

It seems likely that school authorities could successfully argue that an English-only rule applied during all classroom instruction time[275] is reasonably related to the legitimate pedagogical concern of successfully implementing the Sheltered English Immersion approach to English-language acquisition or a similar immersion approach.[276]

However, in order for this argument to prevail, school officials should be required to show that any classroom in which the rule is implemented is populated by at least one student with limited English proficiency. It is not reasonable to insist that a class of students speak only English in order to facilitate English acquisition if all of the students in the class are already proficient in the language.

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[273] *Horne*, 129 S. Ct. at 2601 (citing Brief for American Unity Legal Defense Fund et. al. As *Amici Curiae* Supporting Petitioners at 10–12, *Horne*, 129 S.Ct. 2579 (Nos. 08-289, 08-294); K. TORRANCE, IMMERSION NOT SUBMERSION: LESSONS FROM THREE CALIFORNIA DISTRICTS' SWITCH FROM BILINGUAL EDUCATION TO STRUCTURED IMMERSION 4 (2006)).

[274] ARIZ. REV. STAT. ANN. § 15-751(5) (2009), *quoted in Horne*, 129 S. Ct. at 2600.

[275] It may seem to the reader that an English-only rule is related to legitimate pedagogical concerns only as applied to language classes, not other classes such as math or science. However, the No Child Left Behind Act requires teachers to "combine both language development and content teaching." OVANDO ET AL., *supra* note 28, at 122. Indeed, "teachers are collaboratively planning thematic units that cross curricular areas." *Id.*; *see also* Donna Brinton, *Content-Based Instruction*, *in* PRACTICAL ENGLISH LANGUAGE TEACHING 199, 203 (David Nunan ed., 2003). Thus, it appears that an English-only rule is likely to be considered reasonably related to pedagogical concerns, no matter what class it is implemented in. *But see* James Vaznis, *Boston Students Struggle with English-Only Rule*, BOS. GLOBE, Apr. 7, 2009, at A1 ("Students not fluent in English have floundered in Boston schools since voters approved a law change six years ago requiring school districts to teach them all subjects in English rather than their native tongue . . . .").

[276] *See* OVANDO ET AL., *supra* note 28, at 151 ("It is especially important for students learning English to practice using the new language in meaningful ways."); PEREGOY & BOYLE, *supra* note 224, at 205 (stating that engaging "students in using newly learned words as they explain concepts and ideas in writing and speaking" helps them learn new words); *id.* at 206, fig.6.3 (identifying the use of words in a communicative context as a component of word learning).

It should be noted that Sheltered English Immersion is by no means the only approach to teaching English as a second language.[277] Bilingual education is a popular alternative to Sheltered English Immersion and the other immersion approaches. As its name suggests, the bilingual approach to English-language acquisition and development generally involves instructing students in both English and their native language or languages.[278] There is an ongoing debate in the education community over which method of English-language instruction is most effective.[279] Indeed, there are many significant criticisms levied against the immersion approaches.[280] Nonetheless, even assuming that these criticisms are valid, English immersion will likely be considered reasonably related to English-language acquisition until there is definitive evidence that bilingual

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[277] For a description of various approaches to English as a Second Language instruction, see PEREGOY & BOYLE, *supra* note 224 at 23–27.

[278] LEE GUNDERSON, ENGLISH-ONLY INSTRUCTION AND IMMIGRANT STUDENTS IN SECONDARY SCHOOLS 16 (2007) ("The majority of students' early education in [the bilingual] model is conducted in first language, with a daily 'period' reserved for English instruction. Students begin to transition to English after they have attained a degree of English proficiency."). However, there is no one overarching approach to bilingual education. OVANDO ET AL., *supra* note 28, at 8 ("[B]ilingual education is neither a single uniform program nor a consistent 'methodology' for teaching language minority students. Rather, it is an approach that encompasses a variety of program models . . . ."). In fact, some approaches to bilingual education "incorporate the students' first language merely to facilitate a quick transition into English." *Id.* at 9. Thus, English-only rules could potentially be incorporated into the later stages of bilingual education.

[279] BARON, *supra* note 8, at 174 ("[N]o single method of teaching English as a second language has emerged triumphant."); GUNDERSON, *supra* note 278, at 8 ("There is . . . great debate about what [approach to language acquisition] works for immigrants and those native-born students who speak a language other than English. . . . The debate between English-only and bilingual advocates is often vitriolic."); *id.* at 15 (describing the conflict between advocates for bilingual education and states, such as Arizona and California, that have passed laws requiring English-only instruction in public schools). For criticisms of the bilingual approach, see BARON, *supra* note 8, at 173 (noting, among other issues, that "[b]ilingual programs have acquired the stigma of remedial education"). *See also* GUNDERSON, *supra* note 278, at 262 (stating that immigrant students interviewed for the author's study "argued overwhelmingly that they did not wish to study bilingually"); *cf.* YATVIN, *supra* note 45, at 101 (stating that "even the youngest ELLs in various schools understand that English is the language of public intercourse in the United States[,]" and that ELL students generally do not resent having to learn English). For criticisms of the immersion approach, see GUNDERSON, *supra* note 278, at 263 ("In general, the English-only instruction caused students great stress and turmoil . . . ."), *id.* at 15 (explaining that advocates of bilingual education claim that "students immersed in English will not acquire the academic skills their English-speaking peers are learning"), YATVIN, *supra* note 45, at 101 ("One commonly voiced objection to the practice of teaching ELLs in English is that it demeans their native languages and cultures . . . and reduces their status to that of second-class citizens . . . ."), and Vaznis, *supra* note 275, at 1 (describing a study that found the dropout rate for non-English-speaking students in Boston schools nearly doubled after Massachusetts enacted a law requiring schools to teach all subjects in English).

[280] *See supra* note 279.

education is the superior method.[281] Furthermore, even if such evidence did exist, it might not defeat the rational relationship between English immersion programs and English-language acquisition because bilingual programs are impracticable under some circumstances.[282]

3. *A Word on the* Turner *Analysis*

The *Turner* analysis discussed in the previous section applies whenever a non-English-speaking student is subjected to an English-only rule, even where the rule is implemented to facilitate the acquisition of the English language. However, the *Turner* analysis generally should not affect the constitutionality of an English-only rule under these circumstances. The four factors discussed in *Turner* suggest that an English-only rule is reasonably related to facilitating the acquisition of English, even when applied to a non-English-speaking student.

First, there is a rational connection between English-only rules and the pedagogical interest in English language-acquisition. As discussed above, English immersion programs are a commonly accepted means for facilitating the acquisition of English.[283] Requiring that students speak only English is rationally related to the purpose of immersing the student in the English language. Thus, unlike the marriage restriction at issue in *Turner*, an English-only rule implemented to facilitate the acquisition of English does not "sweep[] much more broadly than can be explained by [educators' pedagogical] objectives."[284]

Second, an English-only rule implemented for the curricular purpose of facilitating English acquisition leaves open alternative means of communication outside of the curricular context. Unlike English-only rules implemented to prevent disruption or bullying, which can potentially apply anywhere on school premises, such rules implemented to facilitate English acquisition can apply only to curricular activities such as classroom instruction time.[285] Thus, non-English-speaking students would be free to communicate with classmates in their native language during non-curricular activities such as recess, lunch, traveling between classes, and riding the school bus. Furthermore, *Turner* and

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[281] The study cited in the Court's *Horne* opinion, along with the sources cited in *supra* note 279, criticizing the bilingual approach, indicate that no such evidence currently exists.

[282] GUNDERSON, *supra* note 278, at 8 ("The increasing diversity [of the U.S. population] makes bilingual programs extremely difficult to design and implement because of a lack of trained teachers, appropriate instructional materials, and programs."); PEREGOY & BOYLE, *supra* note 224, at 26 ("In many urban and suburban areas today, classrooms include students from several language groups, making bilingual instruction difficult to implement.").

[283] *See supra* note 260 and accompanying text.

[284] Turner v. Safley, 482 U.S. 78, 98 (1987).

[285] *See supra* Part V.B.1.

Ortiz indicate that the "alternative means" standard does not require school officials to permit students to communicate at any place or time they desire.[286]

Third, schools may not have ready alternatives to English immersion programs, for bilingual education programs can be quite costly and many schools do not have the resources necessary to implement such programs.[287] Of course, schools can implement English immersion programs without requiring students to speak only English during class time. However, it is not clear that such an alternative would fully accommodate students' rights at de minimis cost to valid pedagogical interests, as required by *Turner*.[288] To the contrary, it is likely that an English-only requirement adds to the effectiveness of an English immersion program.[289]

The factors identified by the Court in *Turner* suggest that an English-only rule is reasonably related to the legitimate pedagogical purpose of facilitating English acquisition. Therefore, such a rule is constitutional under *Turner* where it is implemented as part of a curricular program designed to promote English acquisition and development.

4. *Summing Up the Language Acquisition Analysis*

The development of English-language skills is a strong justification for an English-only rule. Both Congress and the Supreme Court have stated that public schools have a duty to ensure that English language learners gain proficiency in English. Where school authorities assert this justification, they must first show that the restricted activity comes within the school curriculum. This issue is governed by the definition of "curriculum" from *Hazelwood*. Activities such as classroom instruction, school newspapers, theatrical productions, and field trips are likely to come within the curriculum. On the other hand, activities such as recess, lunch, and unsupervised trips to the library will likely fall outside the curriculum.

Assuming that an English-only rule applies to curricular activities, school officials must also show that the rule is reasonably related to a legitimate pedagogical concern. Congress and the Court have both stated that acquisition of the English language is not only a legitimate pedagogical concern but an extremely important one.[290] Furthermore, Congress has given school authorities wide discretion on this issue, and the Supreme Court has recognized English

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[286] *See Turner*, 482 U.S. at 92 (holding a restriction on inmate-to-inmate correspondence constitutional because it "does not deprive prisoners of all means of expression," but instead "bars communication only with a limited class of other people with whom prison officials have particular cause to be concerned"); Ortiz v. Fort Dodge Corr. Facility, 368 F.3d 1024, 1027 (8th Cir. 2004) (finding that allowing a prisoner to call his family members on the phone or see them in person were "sufficient alternatives to letter writing").

[287] *See supra* note 282 and accompanying text.

[288] *Turner*, 482 U.S. at 91.

[289] *See supra* note 276.

[290] *See supra* notes 264–65 and accompanying text.

immersion as a valid approach to facilitating the acquisition of English.[291] Thus, English-only rules will most likely be constitutional under the First Amendment when they are applied in the context of the curriculum. However, in order for this justification to succeed, school officials should be required to demonstrate that the classrooms in which English-only rules are applied are populated by at least one student with limited English proficiency.

C. *Promoting English as a Common Language*

English is the language predominantly spoken in the United States. According to the U.S. Census Bureau, approximately 80% of the U.S. population over the age of five speaks only English at home.[292] Given its predominance, some argue that we as a nation should use government regulation to promote English as a common language.[293] However, there are two reasons why this is probably the least likely of the three interests discussed in this Part to justify a restriction on student speech. First, the Court has not recognized this as a justification for a restriction on student speech. Moreover, the Court in *Meyer v. Nebraska* rejected this very justification for a ban on foreign language instruction. Second, the Ninth Circuit rejected this justification for an Official English amendment to the Arizona state constitution.

1. *The Court Has Not Recognized Promotion of a Common Language as a Justification for a Speech Restriction*

Promoting English as a common language does not fit within any of the school or societal interests recognized by the Court in the student speech line of cases. Nor is this author aware of any case in which the Supreme Court has accepted this as a valid justification for a restriction on speech. In fact, the Court in *Meyer v. Nebraska* expressly rejected this justification for a ban on foreign language instruction.[294]

Meyer was decided in 1923 before the First Amendment was incorporated into the Fourteenth Amendment, and therefore it was decided on the basis of the Due Process Clause rather than the Free Speech Clause.[295] Nevertheless, the

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[291] *See supra* notes 272–73 and accompanying text.

[292] HYON B. SHIN & ROBERT A. KOMINSKI, U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2007, at 2 (2010), *available at* http://www.census.gov/hhes/socdemo/language/data/acs/ACS-12.pdf.

[293] Ruiz v. Hull, 957 P.2d 984, 1001 (Ariz. 1998) (stating that the goal of an official English amendment to the state constitution was "to promote English as a common language"); *see also* Brief for Petitioners at 36, Arizonans for Official English v. Arizona, 520 U.S. 1141 (1997) (No. 95-974) (stating that "government has substantial interests in protecting itself and society from the divisive effects of official multilingualism").

[294] Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

[295] *See* Epperson v. Arkansas, 393 U.S. 97, 105 (1968) (prefacing a discussion of *Meyer* by stating that "[t]he earliest cases in this Court on the subject of the impact of constitutional

Court subsequently recharacterized *Meyer* as a First Amendment case.[296] Thus, while not originally decided on First Amendment grounds, *Meyer* still offers insight into the justifications the Court will accept for restrictions on speech.[297]

The Court decided *Meyer* shortly following the end of World War I. The nation was experiencing a rise in ethnocentrism at that time, and German-Americans were the target of much prejudice.[298] This prejudice manifested itself in the form of state laws banning the teaching of German and other foreign languages in both public and private schools.[299] Nebraska's statute prohibited the teaching of languages other than English before a pupil had passed the eighth grade.[300] Robert Meyer, an instructor at a private parochial school, taught reading in the German language to a ten-year-old student, and he was subsequently convicted of violating the foreign language statute.[301]

The Court explained that states may limit individual liberties, so long as the limitations are not "arbitrary and without reasonable relation to any end within

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guarantees upon the classroom were decided before the Court expressly applied the specific prohibitions of the First Amendment to the States").

[296] Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (referring to *Meyer* for the proposition that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge"); *see also* Yniguez v. Arizonans for Official English, 42 F.3d 1217, 1240 n.25 (9th Cir. 1994) (en banc) ("The fact that the Supreme Court, deciding these cases in the 1920s, struck down the language restrictions in *Meyer* and *Tokushige* as violative of due process does not lessen their relevance. Substantive due process was the doctrine of choice for the protection of fundamental rights during the first part of this century . . . ."), *vacated as moot sub nom.* Arizonans for Official English v. Arizona, 520 U.S. 43 (1997); William G. Ross, *A Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125, 200 (1988) ("Although the Court's use of *Meyer* as a [F]irst [A]mendment principle [in *Griswold* and *Tinker*] may seem odd since the [F]irst [A]mendment was not even mentioned in that case, one might argue that judges may, within certain limits, find that earlier judicial opinions support conclusions which the authors of those opinions neither intended nor foresaw.").

[297] *Meyer* is discussed and cited in a number of public school First Amendment cases. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *Epperson*, 393 U.S. at 105; *see also* PHILIP BOBBIT, CONSTITUTIONAL FATE 240 (1982) ("The present use of precedent transforms it, and the earlier case must then be read in light of the use to which it is later put."). *But see* Morse v. Frederick, 551 U.S. 393, 420 n.8 (2007) (Thomas, J., concurring) (noting that *Meyer* involved a private school and concluding that "*Meyer* provides absolutely no support for the proposition that free-speech rights apply within schools operated by the State").

[298] Ross, *supra* note 296, at 126.

[299] According to Professor Ross, "[t]wenty-three states enacted statutes that imposed restrictions upon instruction in foreign languages." *Id.* at 133. Nebraska was among these states, and according to its state supreme court, the legislature adopted the statute to address the "'baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to [the State's] safety.'" *Meyer*, 262 U.S. at 397–98 (quoting Meyer v. State, 187 N.W. 100, 102 (Neb. 1922)).

[300] *Meyer*, 262 U.S. at 397.

[301] *Id.* at 396.

the competency of the state."[302] One of the legislative ends served by the statute was ensuring "'that the English language should be and become the mother tongue of all children reared in this state.'"[303] While the Court expressed sympathy with this goal of the Nebraska legislature,[304] it also pronounced that "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."[305] The Court ultimately concluded that the State's asserted purposes failed to justify the ban on foreign-language instruction, and therefore the statute violated the Fourteenth Amendment.[306]

Surely the ban on foreign language instruction at issue in this case was reasonably related to the goal of promoting English as a common language. What better way to ensure that English is spoken by all than to prevent people from learning languages other than English?[307] This suggests that promoting English as a common language is not an "end within the competency of the state."[308]

2. *The Ninth Circuit Has Rejected the Promotion of a Common Language as a Justification for Speech Restrictions*

Lower courts have rejected this justification for official English amendments to state constitutions. *Yniguez v. Arizonans for Official English* involved a First Amendment challenge to a state constitutional amendment prohibiting state employees from speaking a language other than English while performing their job duties.[309] Arizonans for Official English—the organization that led the petition drive to amend Arizona's constitution—claimed that the amendment promoted the state's interest in "encouraging a common language."[310] The court stated that it recognized the importance of encouraging a common language as a means of promoting national unity but concluded that "the state cannot achieve unity by prescribing orthodoxy."[311] In reaching this

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[302] *Id.* at 403.

[303] *Id.* at 401 (quoting *Meyer*, 187 N.W. at 102).

[304] *Id.* at 402 ("The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration.").

[305] *Id.* at 401.

[306] *Meyer*, 262 U.S. at 402 ("The interference [with Meyer's rights] is plain enough and no adequate reason therefor[e] in time of peace and domestic tranquility has been shown.").

[307] Yniguez v. Arizonans for Official English, 69 F.3d 920, 946 (9th Cir. 1995) (stating that "there is probably no more effective way of encouraging the uniform use of English than to ensure that children grow up speaking it").

[308] *Meyer*, 262 U.S. at 403.

[309] *Yniguez*, 69 F.3d at 924.

[310] *Id.* at 944.

[311] *Id.* at 946 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)); *see also* Ruiz v. Hall, 957 P.2d 984, 1001 (Ariz. 1998) (striking down an official English amendment

conclusion, the court relied heavily on *Meyer* and *Farrington v. Tokushige*[312]—another Supreme Court case that involved a statute similar to that in *Meyer*.[313]

Thus, the Supreme Court and the Ninth Circuit have each addressed this issue or a related issue. Both authorities suggest that promoting English as a common language would not adequately justify an English-only rule applied to public school students.

VII. CONCLUSION

Our nation is growing more ethnically and linguistically diverse every day.[314] Nowhere is the impact of this development felt more acutely than in our public schools.[315] The increasing linguistic diversity of the nation's student population poses a special challenge for school authorities, for they must meet each child's academic needs and find ways to bridge the language barriers that may exist between non-English-speaking students, teachers, and administrators. English-only rules have historically played a large role in school authorities' attempts to meet these challenges, and this will likely continue well into the future.

This Note marks the first in-depth analysis of the constitutionality of English-only rules in public schools under the First Amendment. Such rules also raise issues under a variety of other laws, including the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and state constitutional provisions.[316] Analysis of these issues raises novel constitutional questions of great complexity. Further research is needed on this important topic, and I hope this Note will serve as a catalyst.

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and stating that the "goal to promote English as a common language does not require a general prohibition on non-English usage").

[312] 273 U.S. 284 (1927).

[313] *Yniguez*, 69 F.3d at 945–46.

[314] *See supra* notes 23, 24, 38, 39 and accompanying text.

[315] *See supra* note 37 and accompanying text.

[316] Some state constitutions are more protective of an individual's rights than the U.S. Constitution. *See, e.g.*, Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 203–04 (Alaska 2007); *In re* Initiative Petition No. 366, 46 P.3d 123, 126 (Okla. 2002).